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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOE ISAACSON,
PHYLLIS LISA ISAACSON, ET AL.,

Petitioners,

v.

DOW CHEMICAL COMPANY,
MONSANTO COMPANY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a private corporation that was performing under a federal government contract but is sued for actions neither addressed in the contract nor otherwise directed or controlled by the government may nevertheless remove a state court civil action to federal court under 28 U.S.C. § 1442(a)(1) based on the mere fact that it is a government contractor.

PARTIES TO THE PROCEEDING

Petitioners (with circuit court docket numbers):

Joe Isaacson (05-CV-1820)
Phyllis Lisa Isaacson (05-CV-1820)
J. Michael Twinam (05-CV-1509)
Robert S. Bauer (05-CV-1693)
Sandra J. Bauer (05-CV-1693)
Sheryl A. Walker (05-CV-1694)
Eric C. Walker (05-CV-1694)
Stephen J. Walker (05-CV-1694)
William Hamilton (05-CV-1694)
Esther M. Hamilton (05-CV-1694)
Sherman Clinton Stearns (05-CV-1695)
Dortha Monyene Stearns (05-CV-1695)
Charles T. Anderson (05-CV-1698)
Vickey S. Garncarz (05-CV-2450)

Respondents:

Dow Chemical Company
Monsanto Company
Hercules Incorporated
Occidental Chemical Corporation
Ultramar Diamond Shamrock Corporation
Chemical Land Holdings, Inc.
T-H Agriculture and Nutrition Company, Inc.
Thompson Hayward Chemical Company
Harcros Chemicals, Inc.
Uniroyal, Inc.
C.D.U. Holdings, Inc.
Uniroyal Chemical Company

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INTRODUCTION

This case presents an important question concerning the allocation of state and federal judicial authority that has divided the lower federal courts. The court of appeals held that any time a defendant is sued for violations of state law that occurred while the defendant was performing under a contract with the federal government, regardless of whether the conduct forming the basis for suit was addressed in the contract or otherwise directed or controlled by the government, the defendant may remove the case to federal court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), as a "person acting under" a federal officer being sued for acts done "under color of such office." This extraordinarily broad holding, permitting virtually every government contractor to have its cases litigated in federal court, conflicts with numerous decisions of other federal courts holding that this and other statutes covering conduct done "under color" of government office only apply where the government actually directed the precise conduct that is the basis for the suit. The Court should grant the petition to resolve this split over whether every government contractor is entitled to federal court jurisdiction simply because it was performing a government contract.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-22a) is reported at 517 F.3d 129 (2d Cir. 2008). The order denying rehearing is unreported and reproduced at App. 43a-44a. The opinion and order of the district court (App., *infra*, 23a-42a) denying petitioners' motion for remand is reported at 304 F. Supp. 2d 442 (E.D.N.Y. 2004). A related opinion on the merits of Petitioners' claims was handed down by the Court of Appeals on the same day as its decision below, and is reported at 517 F.3d 76 (2d Cir. 2008).

JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 2008. Petitioners filed a timely petition for rehearing with a request for rehearing *en banc*, which the court of appeals denied on May 8, 2008. On July 28, 2008, Justice Ginsburg extended the time for filing a petition for a writ of *certiorari* until October 6, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The federal officer removal statute, 28 U.S.C. § 1442(a), provides in relevant part:

> (a) A civil action or criminal prosecution commenced in a State court against any of

the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

STATEMENT OF THE CASE

A. The Underlying Case Against Respondents

Petitioner Joe Isaacson enlisted in the Air Force and served in Vietnam from September 1968 to September 1969. During his tour of duty, Isaacson served as a crewman at one of the airfields that supported Operation Ranch Hand, the name for the campaign in which airplanes took off to spray mixtures of chemical herbicides, including those containing the "Agent Orange" contaminant dioxin. In 1996, when he was working as a junior high school assistant principal, Isaacson was diagnosed with non-Hodgkin's lymphoma, a rare cancer recognized to be

caused by exposure to dioxin. After his diagnosis, Isaacson filed a lawsuit against Respondents, the manufacturers of Agent Orange, in state court in New Jersey, alleging that his exposure to the chemical products they manufactured caused his cancer.[1]

Isaacson's case itself arises out of the government's purchase of various herbicides for use in Vietnam – primarily "Agent Purple," an equal blend of 2,4-Dichlorophenoxyacetic acid ("2,4-D") and various esters of 2,4,5-Tricholorophenoxyacetic acid ("2,4,5-T"), and "Agent Orange," an equal blend of 2,4-D and one 2,4,5-T ester (hereinafter collectively referred to as "Agent Orange."). The 2,4,5-T in each of these Agents was contaminated by an extremely toxic, unwanted

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[1] Even though the cases brought by the different Petitioners herein were never consolidated before the district court, the Second Circuit issued one opinion regarding removal directed to all the cases that were before it. In this decision it only discussed the *Isaacson* Petitioners directly. The other district court cases that were included within the Second Circuit's decision were: *Twinam v. Dow Chemical Co.* (05-CV-1509); *Bauer v. Dow Chemical Co.* (05-CV-1693); *Walker v. Dow Chemical Co.* (05-CV-1694); *Stearns v. Dow Chemical Co.*, (05-CV-1695); *Anderson v. Dow Chemical Co.* (05-CV-1698); and *Garncarz v. Dow Chemical Co.* (05-CV-2450). These Petitioners or their spouses or the parent of Petitioners listed herein likewise served in Vietnam, were exposed to Agent Orange, and were diagnosed in or after 1995 with cancer and/or other illnesses caused by exposure to dioxin. This Petition is jointly brought on behalf of all Petitioners referenced by case number in the court of appeals' decision. *See* App. 1a. However, it will specifically highlight the case of the *Isaacson* Petitioners just as the Second Circuit did.

byproduct, dioxin (2,3,7,8-Tetrachlorodibenzo-para-dioxin or TCDD).

Certain relevant facts regarding Isaacson's claim are uncontested: 1) during the manufacture of 2,4,5-T, increasing amounts of dioxin were produced in direct relationship to the amount of heat used during the manufacturing process; *see In re "Agent Orange" Product Liability Litigation*, 517 F.3d 76, 83-84 (2d Cir. 2008), AB47-56, AS22, 25;[2] 2) Respondents knew at the time they were manufacturing 2,4,5-T that dioxin was a byproduct of its manufacture and that it could cause harm to humans exposed to it, *see In re "Agent Orange,"* 517 F.3d at 84; 3) Respondents had unfettered control over their often proprietary manufacturing processes; *Id.* at 83, AB47-56;[3] 4) no contract specified or even mentioned the existence of dioxin in the product being delivered to the U.S.

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[2] Petitioners' Appendix herein is designated "App. __a." The following are references made to the record before the Second Circuit: the related *Bauer* [05-CV-1693] opening and reply briefs are designated "AB" and "RB," respectively; the *Isaacson* [05-CV-1820] opening and reply briefs are designated "AI" and "RI"; the related *Stephenson* [05-CV-1760] opening and reply briefs are designated "AS" and "RS"; Petitioners'/Appellants' Court of Appeals' Appendix is designated "AA."

[3] *See also Hercules Inc. v. United States*, 24 F.3d 188, 197 (Fed. Cir. 1994) ("Put another way, nothing the government did or failed to do had any impact upon Hercules' and Thompson's production of Agent Orange."); *Maxus Energy Corp. v. United States*, 898 F. Supp. 399, 402 (N.D. Tex. 1995) ("Diamond was responsible for controlling product quality."), *aff'd*, 95 F.3d 1148 (5th Cir. 1996).

government, AS40, AB33-34; 5) unlike Respondents, the United States government officials involved in the procurement process were not aware of the existence of dioxin in the final product they had contracted for, AS40, AB34-36; and 6) unlike Respondents, the United States government did not possess the equipment necessary to test for dioxin contamination of 2,4,5-T. RS28, AA6454-4.[4] Finally, it is this dioxin that Petitioners claim caused the injuries of which they now complain.

B. The District Court and the Issue of Remand

Respondents removed the action to the United States District Court for the District of New Jersey, which accepted the removal based on the All Writs Act, 28 U.S.C. § 1651. *See* App. 26a-28a (district court opinion below, recounting procedural history of case).

The case was then consolidated as part of Multidistrict Litigation No. 381, *In re "Agent Orange" Product Liability Litigation*, and transferred to the Eastern District of New York. The district court (Weinstein, J.) granted Respondents' motion to dismiss the claims of Isaacson and another Plaintiff ("Stephenson") as barred by a nationwide class action settlement approved almost two decades earlier, even

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[4] By contrast, Respondents regularly tested their products for the level of dioxin contamination. *See, e.g.*, RB37-38, AA6837-6838. The government itself did not know that such a test could be performed until 1970. AA6454-4.

though Isaacson was uninjured at the time of the settlement and all settlement funds had been expended by the time of his diagnosis.

On appeal, the United States Court of Appeals for the Second Circuit affirmed the assertion of jurisdiction over Isaacson's claims based on the All Writs Act, while holding that their actions were not barred and thus could proceed. *See Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 256-61 (2d Cir. 2001).

This Court granted Respondents' petition for a writ of *certiorari* and affirmed by an equally divided Court the Second Circuit's judgment reversing the dismissal of Stephenson's claims, while vacating the Second Circuit's judgment as to Isaacson's claims. *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003). The Court remanded Isaacson's case for reconsideration in light of *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002), which held that the All Writs Act does not create federal question jurisdiction.

On remand, the Second Circuit vacated the district court's dismissal order as to Isaacson on grounds that jurisdiction did not lie under the All Writs Act and remanded the case for consideration of alternative grounds for federal jurisdiction. *Stephenson v. Dow Chem. Co.*, 346 F.3d 19 (2d Cir. 2003). The alternative ground advanced to the district court was whether removal could still be maintained

under the federal officer removal statute, 28 U.S.C. § 1442(a)(1).

The district court had previously considered this issue in another "*Agent Orange*" case and decided that the facts did not warrant removal under 28 U.S.C. § 1442(a)(1). *See Ryan v. Dow Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992). In *Ryan*, the district court had granted remand, holding that the defendants "are being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants." *Id.* at 950. *Ryan* further found that the government had "bought the chemical components for Agent Orange and other defoliants as existing products privately developed and used them in mixtures which were derived from the defendants' standard recipes." *Id.* Accordingly, *Ryan* concluded that "[t]he government sought only to buy ready-to-order herbicides, not to cause, control, or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs' injuries." *Id.*

However, when addressing Isaacson's remand motion, the same district court, reviewing the same factual record, held that federal jurisdiction was properly asserted under the federal officer removal statute. *See* App. 23a-42a. In its decision below, the district court held, as it had in *Ryan*, that the Respondent corporations were "persons" under § 1442(a)(1). App. 31a-32a. But the district court reversed its *Ryan* ruling that the government contractor defense alone

did not satisfy the statute's implied requirement that a colorable federal law defense be asserted. App. 40a. More significantly, the district court reversed its earlier understanding of the facts and held that Respondents showed that they were "acting under color of federal office," because "the government designed, controlled and supervised the production of Agent Orange." App. 36a. This finding was necessary because the district court interpreted the law as requiring a "causal nexus between the defendant's action under federal office and plaintiff's state law claims," App. 32a, and held that this is satisfied "when there is evidence of intimate government involvement in the design decisions causally related to the alleged tort." App. 34a.

On March 2, 2005, the district court ruled that all other Petitioners herein had also been properly removed.

C. The Decision of the Court of Appeals

After the district court granted summary judgment for Respondents based on their assertion of the government contractor defense, Petitioners appealed the district court's removal decision to the Second Circuit, which affirmed the district court's finding of jurisdiction. App. 1a-22a. However, rather than simply follow the district court's rulings, the Second Circuit went a long way toward rejecting the district court's factual underpinning. It held the same as the district court only by significantly broadening the

removal statute's coverage to create federal jurisdiction over virtually *any* conduct committed by a government contractor during the performance of the government contract. *See* App. 14a-18a.[5]

In particular, with respect to the removal statute's principal provisions limiting its coverage to persons "acting under" a federal officer and being sued for an act done "under color of such office," the Second Circuit's analysis markedly contrasted with that of the district court. This is because the Second Circuit, in its simultaneously but separately-issued summary judgment opinion, *In re "Agent Orange," supra*, 517 F.3d 76, expressly rejected the district court's conclusion that "the government designed, controlled and supervised the production of Agent Orange," finding instead that:

> The defendants do not contest that the government's contractual specifications for Agent Orange are silent regarding the method of manufacturing or that the government harbored no preference, expressed or otherwise, regarding how the herbicides were to be produced. . . . Indeed, they admit that they were under no federal contractual

[5] The court of appeals did, however, embrace the district court's rationales in holding that Respondents were "persons" covered by the removal statute, App. 11a-14a, and that the federal government contractor defense standing on its own satisfied the requirement that a colorable federal law defense be asserted. App. 19a-22a.

> duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the toxicity levels.

Id. at 93.

Having thus separately rejected the factual basis for the district court's jurisdictional ruling, the Second Circuit proceeded in its removal opinion to interpret the removal statute's "acting under" and "acts under color" requirements far more broadly than has any other court. First, with regard to whether Respondents were acting under a federal government officer, the Second Circuit found that this requirement is to be "interpreted broadly, and the statute as a whole must be liberally construed." App. 14a. Based on this broad and liberal construction, the Second Circuit held that, "through their contracts with the Government to produce Agent Orange, [it was enough that] the chemical companies **assisted** and **helped carry out** the duties or tasks of officers at the Department of Defense," so that Respondents "thus had the special relationship with the Government required by the 'acting under' prong." App. 16a (citation omitted) (emphasis added).

In addressing the removal statute's requirement of acts done "under color of" federal office, the court of appeals likewise found that "[t]he hurdle erected by this requirement is quite low," and that, to show causation under this prong, "Defendants must only establish that the act that is the subject of Plaintiffs' attack (here, the production of the byproduct dioxin) occurred while Defendants were performing their

official duties." App. 16a-17a. Alternatively, the Second Circuit held that it would be sufficient to base its determination upon a removing government contractor's own "**theory of the case**," *i.e.* that "the Government knew that Agent Orange contained dioxin, and the Government controlled the method of formulation." App. 17a (emphasis added). Yet, the "theory" that the government controlled production was exactly what the panel itself had expressly rejected in its summary judgment opinion as not being supported by any evidence. *In re "Agent Orange,"* 517 F.3d at 93.

In affirming the district court, the Second Circuit substantially broadened the federal officer removal statute to cover every conceivable government procurement contractor sued for conduct that occurred while it was performing the contract. Without considering whether the government directed or even knew of the conduct at issue, the court of appeals held that there is federal jurisdiction for all government contractors so long as the acts complained of either occur while they are performing the contract or the contractor merely theorizes that the acts were done under government direction.

REASONS FOR GRANTING THE PETITION

This Court has held that, to remove a case under 28 U.S.C. § 1442(a)(1), the removing party must: 1) be an eligible "person" under the statute; 2) raise a colorable federal defense; 3) assert that the acts complained of were undertaken while "acting under an officer" of the United States government; and 4) establish that the suit is "for an act under color of [federal] office," by demonstrating a **"'causal connection' between the charged conduct and asserted official authority."** *Willingham v. Morgan,* 395 U.S. 402, 409 (1969) (emphasis added). However, the court of appeals' expansive interpretation renders this four-part analysis moot as to government contractors. Indeed, it grants removal rights to federal contractors that are broader than those recognized for federal employees whose removal claims this Court has scrupulously evaluated and limited.

First, the Second Circuit held that corporations that contract with the government are always "persons," and thus proper removing parties. App. 11a-14a. Second, under the Second Circuit's analysis, government contractors meet the colorable defense requirement by definition. App. 19a-22a. Third, the court of appeals held that the "special relationship" required pursuant to the "acting under" provision is met by the mere fact that the defendant entered into a government contract. App. 14a-16a. Finally, the Second Circuit rendered moot the question of whether the act performed was done "under color of [federal] office" by holding that contractors satisfy this by

showing that the act occurred at any time in the course of performing the government contract or by conjuring up a "theory" that the act was undertaken at the government's direction, App. 16a-18a, a "theory" that the court accepts at face value even if it is blatantly wrong. In short, according to the Second Circuit, any suit filed against a government contractor for any acts undertaken during the contract's performance is removable under 28 U.S.C. § 1442(a)(1).

This holding radically expands the existing division among federal courts over how much government control is needed for a private actor to be deemed to be "acting under" a government officer and to be sued for acts done "under color of" such office. The approach taken by the Second Circuit conflicts with the courts of nearly every other circuit regarding what is necessary in order to determine when a private actor is acting "under color" of government office when performing the acts complained of in a lawsuit.

In sharp contrast to the decision below, numerous federal courts have held in granting motions to remand that state-law claims against federal contractors fall within the removal statute only if they are targeted at conduct that the government specifically directed. These decisions are consistent with this Court's ruling in *Mesa v. California*, 489 U.S. 121 (1989), that removal under this statute is unavailable *even to federal officers* if they could not assert a basis in federal law for their on-the-job conduct that state

authorities were prosecuting. These decisions also are more consistent with rulings by this Court and various circuit courts addressing private action under civil rights statutes covering acts done "under color of" state law, *see, e.g.*, 42 U.S.C. § 1983, and holding that such statutes require focus on "'the specific conduct of which the plaintiff complains.'" *American Manuf.'s Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

Nothing demonstrates the confusion among federal courts more than the extreme variability in addressing the removal issue shown by the courts below first in *Ryan*, *supra*, and then in the two decisions in this case. Each of these decisions articulates entirely different standards regarding how much, *if any*, government control is required to bring a private contractor's conduct violating state law within the ambit of the federal officer removal statute. In *Ryan v. Dow Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992), the district court held that:

> removal by a 'person acting under' a federal officer must be predicated upon a showing that the acts that form the basis for the state civil or criminal suit were performed pursuant **to an officer's direct orders or to comprehensive and detailed regulations**. . . . [A] person or corporation establishing only that the relevant acts occurred under the general auspices of a federal office or officer is not entitled to section 1442(a)(1) removal.

Id. at 947 (emphasis added). In its decision below, by contrast, the same district court held that removal instead required just "a substantial degree of direct and detailed federal control." App. 32a. When Petitioners appealed this ruling, the Second Circuit went further by finding that all that was necessary was for "the chemical companies [to have] assisted and helped carry out the duties or tasks of officers at the Department of Defense," in order for Respondents to have "the 'special relationship' with the Government required by the 'acting under' prong." App. 16a (citation omitted).

As explained below, this Court's review is essential to bring clarity to this important jurisdictional provision meant to maintain a proper division between state and federal judicial authority as it applies to the multitude of claims that are asserted against private companies performing under all manner of contracts with the federal government.

I. THE SECOND CIRCUIT'S DECISION DIVIDES THE FEDERAL COURTS ON SIGNIFICANT ISSUES PERTAINING TO THE PROPER APPLICATION OF THE FEDERAL OFFICER REMOVAL STATUTE.

The Second Circuit's expansive interpretation of 28 U.S.C. § 1442(a)(1), allowing government contractors to invoke federal jurisdiction for virtually every state-law claim, directly conflicts with significant federal case law requiring, depending upon the court,

direct and detailed control of the government contractor's activities and/or a direct connection between the state-law claims being brought and the federal authority. Much of this contrary authority is in federal district court opinions, because orders granting remand are not appealable under 28 U.S.C. § 1447(c). *See Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 127 (3d Cir. 1998) (dismissing appeal of remand order rejecting § 1442(a)(1) removal by government contractor that manufactured asbestos-insulated turbines for Navy aircraft carrier); *cf. Powerex Corp. v. Reliant Energy Services, Inc.*, 127 S. Ct. 2411, 2416 (2007) (holding that § 1447(c) bars review of remands for lack of jurisdiction). In light of this prohibition, this Court has recognized splits of authority involving district courts over questions of removal and subject matter jurisdiction as warranting *certiorari* review. *See, e.g., Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 349 and n.2 (1999); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477 and n.3 (1981).

This is such a case because the conflict between the Second Circuit's decision below and a wealth of district court authority applying § 1442(a)(1) is clearly defined. The Second Circuit held that a government contractor is deemed to be "acting under" a federal officer by virtue of mere participation in the contract alone, App. 16a, and that *any* action taken while performing the contract is deemed "under color" of federal office. App. 17a. By contrast, this expansive interpretation of the statute was rejected by a district court in the Eleventh Circuit. *See Kennedy v. Health*

Options, Inc., 329 F. Supp. 2d 1314, 1318 (S.D. Fla. 2004) ("The contractual relationship between intermediaries and the Health Care Financing Administration does not in itself constitute the direct and detailed control that is required to assert federal jurisdiction.").

Moreover, a number of district courts have remanded cases involving government contractors based upon a review of whether the removing contractor was required or directed by federal authority to perform the *specific conduct challenged in the state-law claim*. In *Green v. A.W. Chesterton Co.*, 366 F. Supp. 2d 149 (D. Me. 2005), for example, the court remanded claims by a surviving spouse of a shipyard worker against the manufacturer of asbestos-insulated turbines on Navy ships. In rejecting the defendant's § 1442(a)(1) removal arguments, *Green* held that the statute's "acting under" provision required evidence that "the US Navy specified the incorporation of asbestos into the defendant's product to which the decedent was exposed so that there is a 'causal nexus between the federal officer's directions and the plaintiff's claims.'" *Id.* at 155 (quoting *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998)).

Similarly, in *Arness v. Boeing North American, Inc.*, 997 F. Supp. 1268 (C.D. Cal. 1998), involving claims by persons exposed to trichloroethylene manufactured for use on an Air Force base and disposed therefrom, the court rejected the private defendants' removal arguments for claims of negligent disposal

because defendants failed to allege that disposal activity was undertaken at the government's behest. The court held that "the critical question under the federal officer removal statute is to what extent defendants acted under federal direction at the time they engaged in the conduct now being sued upon." *Id.* at 1275-76 (citation omitted). In *Good v. Armstrong World Industries, Inc.*, 914 F. Supp. 1125 (E.D. Pa. 1996), where a Navy yard worker was exposed to asbestos in turbine generators, the court likewise rejected federal officer removal because neither the removal notice nor the supporting affidavit "establishe[d] that a federal officer required the use of asbestos in the design and manufacture of the turbine generators." *Id.* at 1130.[6]

Other courts have looked more specifically at a contractor's state-law duties. In *Freiberg v. Swinerton & Walberg Property Serv's, Inc.*, 245 F. Supp. 2d 1144 (D. Colo. 2002), the court remanded claims by a nuclear weapons production facility worker against an on-site contractor whose work exposed the plaintiff to asbestos. In rejecting the contractor's arguments for

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[6] *See also Akin v. Big Three Industries, Inc.*, 851 F. Supp. 819, 823 (E.D. Tex. 1994) ("Finally, GE must establish a nexus between the acts it performed at the direction of the Secretary of the Air Force and the present claims for relief."); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992) ("Defendant General Dynamics must next show that it was 'acting under' an officer of the United States by establishing a nexus between the actions of the federal officers and the actions for which the defendant is being sued.").

removal under § 1442(a)(1), *Freiberg* held that the contractor failed to satisfy the statute's causal nexus requirement because it could not demonstrate that "the state action 'has arisen out of the acts done by' the defendant 'under color of federal authority and in enforcement of federal law,'" and could not "'exclude the possibility that' the state action 'was based on acts or conduct of his not justified by his federal duty.'" *Id.* at 1155 (quoting *Mesa*, 489 U.S. at 131-32). Similarly, based on state-law failure to warn claims by the surviving spouse of steel mill worker exposed to asbestos installed pursuant to a World War II era defense plant contract, the court rejected federal officer removal because of the defendant's failure to show "that the government authority it operated under directly interfered with its ability to fulfill its state law obligation to warn its employees of safety hazards."

In sum, the Second Circuit's decision amplifies the fact that there is considerable division and confusion among federal courts over the federal officer removal statute's application to claims against government contractors.[7] In order to bring

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[7] The Second Circuit's predicate holding that Respondent corporations are "persons" entitled to removal under the statute, App. 14a-16a, likewise conflicts with several district court opinions holding that the statute only applies to *natural* persons and not corporate entities. *See, e.g.*, *Krangel v. Crown*, 791 F. Supp. 1436, 1442 (S.D. Cal. 1992); *Roche v. American Red Cross*, 680 F. Supp. 449, 455 (D. Mass. 1988). Additionally, the Second Circuit's holding that Respondents' assertion of the

(Continued on following page)

consistency and clarity to this important area of jurisdictional law, the Court should grant *certiorari*.

II. THE SECOND CIRCUIT'S EXPANSION OF § 1442(a)(1) TO COVER *ALL* PRIVATE CONDUCT DONE IN CONNECTION WITH GOVERNMENT CONTRACTS IS LEGALLY ERRONEOUS.

Beyond its incompatibility with other federal court decisions, the ruling below should be reviewed because it is manifestly incorrect. Specifically, the Second Circuit's expansive reading of the federal officer removal statute's "acting under" and particularly its "under color" of federal office provisions conflicts with this Court's decisions applying this statute and identically worded provisions of federal law.

A. The Second Circuit Broadened the Removal Statute's "Acting Under" Provision Beyond Recognition.

First, as discussed, the Second Circuit held that Respondents satisfied the statute's "acting under" a

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government contractor defense satisfies the statute's requirement of a colorable federal defense, App. 19a-22a, is in tension with federal court authority questioning this proposition. *See, e.g.*, *Freiberg*, 245 F. Supp. 2d at 1151 n.5 (D. Colo. 2002) (questioning "whether the government contractor 'defense' asserted by [defendant] is the type of federal interest or immunity for which § 1442(a)(1) was intended to provide an exclusively federal forum").

federal officer requirement simply by virtue of the fact that they contracted with the government to provide a product used by the military. App. 16a. In *Watson v. Philip Morris Companies, Inc.*, 127 S. Ct. 2301 (2007), this Court addressed the same provision in both holding that a private defendant's conduct in complying with federal regulations does not constitute "acting under" a federal officer, and that this is so "even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id.* at 2308. This Court found instead that the "acting under" requirement refers to a relationship that "typically involves 'subjection, guidance, or control.'" *Id.* at 2307 (quoting Webster's New International Dictionary 2765 (2d ed. 1953)).

To be sure, *Watson* discussed the Fifth Circuit's ruling in *Winters*, *supra*, which had granted removal by defendants that contracted to manufacture Agent Orange.[8] *Watson* stated with regard to the Agent

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[8] Significantly, and unlike in *Winters*, the panel's review of the substantial record below revealed that the alleged "regulation, monitoring or supervision" never existed. Moreover, in its separate opinion on summary judgment, the panel below limited *Winters* and the Fifth Circuit's companion decision of *Miller v. Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001), as follows:

> The Fifth Circuit relying in large part on our *Agent Orange I* determination concluded the same. *See Miller*, 275 F.3d at 421. But we are required to review the factual record anew as it is presented to us, not as it was presented to a different panel twenty years ago. **And we note, as we did in *Agent Orange I*, that we were in 1987 without the benefit of briefing**

(Continued on following page)

Orange manufacturers in *Winters* that they were "helping the government to produce an item it needs," and that, "*at least arguably*, Dow performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." 127 S. Ct. at 2307 (emphasis added). However, after recognizing this arguable distinction, *Watson* concluded that it "need not further examine here (a case where private contracting is not at issue) whether and when particular circumstances may enable private contractors to invoke the statute." *Id.*

However, the Second Circuit's own factual analysis makes it clear that the court erred in relying on *Watson*'s *dicta* regarding "Agent Orange" contractors. *See* App. 15a. Instead, it should have followed *Watson*'s actual holding that § 1442(a)(1) requires a relationship involving "subjection, guidance, or control." 127 S. Ct. at 2307. The absence of such subjection, guidance, or control of Respondents' activities (*i.e.* their defective manufacturing processes resulting in the production of large amounts of the toxic dioxin contaminant) is made clear by the Second Circuit's

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by the parties on this subject. *Agent Orange I Opt-Out Op.*, 818 F.2d [187, 190 (2d Cir. 1987)].

In re "Agent Orange," 517 F.3d at 98 n.19 (emphasis added). In fact, at the time *Winters* and *Miller* were being decided, all "*In re Agent Orange*" documents were being stored at the National Archives and were relatively inaccessible. For this or other reasons, in response to Respondents' extensive submissions, plaintiffs' counsel offered no evidence in *Winters* and just a single affidavit by Admiral Elmo Russell Zumwalt, Jr. in *Miller*.

own finding in its simultaneously issued summary judgment opinion:

> The defendants do not contest that the government's contractual specifications for Agent Orange are silent regarding the method of manufacturing or that the government harbored no preference, expressed or otherwise, regarding how the herbicides were to be produced. . . . Indeed, they admit that they were under no federal contractual duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the toxicity levels.

In re "Agent Orange," 517 F.3d at 93. As a result, the Second Circuit did not *and could not* hold that Respondents were under government control or compulsion to produce Agent Orange with the extremely toxic dioxin additive that is the basis of Petitioners' state-law claims. Absent such government control, the Second Circuit's "acting under" determination is contrary to this Court's articulated requirements in *Watson*, and thus merits review and reversal by this Court.

B. The Second Circuit's Determination That There Need Not Be Any Underlying Analysis as to Whether a Contractor Acted "Under Color of Office" is Contrary to Every Decision of This Court.

The Second Circuit's even more expansive interpretation of the removal statute's requirement of acts

done "under color" of federal authority is contrary to this Court's ruling in *Mesa*, *supra*, denying removal of a state's prosecution of federal *officers* for acts they committed on duty. In *Mesa*, the Court addressed homicide and reckless driving prosecutions brought by the State of California against two United States Postal Service Workers for acts they committed while performing their Postal Service duties. 489 U.S. at 123-24. Although the parties agreed that these federal employees were "persons acting under" an "officer of the United States," they disputed whether the employees were being prosecuted for "act[s] under color of such office." *Id.* at 125. In unanimously answering this latter question in the negative, the Court held that the fact that these federal officer defendants were being prosecuted for acts committed while on duty was insufficient to show that they were acting under color of federal office. *Id.* at 135. In light of *Mesa*'s holding that federal officers themselves cannot remove state-law claims based solely on the fact that they address conduct committed while on duty, the Second Circuit clearly erred in holding below that *private* contractors can do just that by removing claims based on the mere fact that they were performing under a government contract with no reference whatsoever to federal authorization of the specific conduct being prosecuted. *See* App. 17a ("[E]ven if plaintiffs were to prove that the dioxin contamination occurred because of an act not specifically contemplated by the government contract, *it is enough that the contracts gave rise to the contamination.*") (emphasis added).

Furthermore, the Second Circuit's expansive interpretation of the removal statute's provision covering acts done "under color" of federal office conflicts with decisions by this Court and various circuit courts alike holding that identical language in federal civil rights statutes requires focus on "the specific conduct of which the plaintiff complains." *American Manufacturers*, 526 U.S. at 51 (addressing 42 U.S.C. § 1983) (citation omitted); *see also Tancredi v. Metropolitan Life Ins. Co.*, 316 F.3d 308, 312 (2d Cir. 2003) (quoting *American Manufacturers*); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 836 (9th Cir. 1999) ("Instead, contemporary decisions stress the necessity of a *close nexus* between the state and the challenged conduct rather than application of a mechanistic formula.") (emphasis in original) (citation omitted); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1452 (10th Cir. 1995) (same).

Under the identical language of § 1983, this Court has held that "[a]cts of . . . private contractors *do not become acts of the government by reason of their significant or even total engagement in performing public contracts.*" *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (emphasis added). The decision below flies in the face of this authority by holding that § 1442(a)(1)'s identical "under color" provision requires that defendants "only establish that the act that is the subject of Plaintiffs' attack (here, the production of the byproduct dioxin) occurred while Defendants were performing their official duties." App. 16a.

Also in accord with the fact that the statute requires focus on the specific conduct being sued upon in the state action is this Court's interpretation of the identical "under color" language found in the civil rights removal statute, 28 U.S.C. § 1443(2), pertaining to persons engaged in law enforcement. *City of Greenwood v. Peacock*, 384 U.S. 808, 824 (1966) ("[W]e hold that the second subsection of § 1443 confers a privilege of removal only upon federal officers or agents and those authorized to act with or for them **in affirmatively executing duties** under any federal law providing for equal civil rights.") (emphasis added).

Since the Second Circuit's expansive application of § 1442(a)(1)'s "under color" provision cannot be squared with this Court's consistent requirement that the specific action must have been performed subject to federal officer direction or control, certiorari should be granted to reverse this clear error of law in concluding that the acts giving rise to removal include those done without any federal authorization or knowledge whatsoever.

III. THE SECOND CIRCUIT'S DECISION RAISES JURISDICTIONAL ISSUES OF EXCEPTIONAL IMPORTANCE.

Finally, certiorari should be granted because, based upon the Second Circuit's exceptionally broad removal policy, a significant infusion of cases involving government contractors has the potential to

overwhelm already over-burdened federal courts. There is no question that the number of contracts entered into by the government has mushroomed in recent years. The 2007 defense budget alone allocated over $84 billion for contract procurement.[9] As this contracting has expanded, the number of suits brought against government contractors will inevitably keep pace.[10] Under the ruling below, virtually all of these cases will be removable to federal court.

There is widespread agreement that the federal judiciary is already stretched to the limit.[11] With such burgeoning dockets, it is rather easy to forget that the entire federal Article III judiciary has roughly half the judges of the state of California and that federal

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[9] *See* www.defenselink.mil/comptroller/defbudget/fy2007/fy2007_p1.pdf at 4.

[10] *See, e.g., In re Blackwater Security Consulting, LLC*, 460 F.3d 576 (4th Cir. 2006) (denying appeal of order remanding survivor wrongful death and fraud claims against defense subcontractor for misrepresenting terms of and providing inadequate security provisions for support services performed in Iraq); *see also Kennedy v. Health Options*, *supra*, 329 F. Supp. 2d at 1314 (remanding state law damages claim against private Medicare insurer for injuries resulting from denial of medical care).

[11] *See, e.g.*, Wilkinson, *The Drawbacks of Growth in the Federal Judiciary*, 43 Emory L.J. 1147 (Fall 1994); Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. Rev. 1, 4, 7-9 (overburdening the federal courts will result in a "decline in the high quality of justice the nation has long expected of the federal courts," and a key to avoiding that result is to limit "inefficient allocations of jurisdiction").

courts are necessarily courts of limited jurisdiction – both
Constitutionally and practicably. The decision below, however, threatens these limitations by construing the federal officer removal statute as broadly as possible. By contrast, this Court has cautioned in analogous circumstances that the federal diversity jurisdiction statute should be strictly construed to "reliev[e] the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts.'" *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941) (quoting Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 510).

Furthermore, routing injured parties, including our soldiers and veterans, to often distant federal courts exacts an unreasonable price on people who often have limited resources. Distance from the courthouse alone can limit participation in the judicial process. And this is only one of the reasons prosecuting cases in federal courts is generally viewed as more expensive than litigation in state court.[12] This factor, and the location of their counsel in major cities where federal courts are almost always located, provide an advantage to large corporate defendants

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[12] *See also* Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 404 (1992) (finding that both plaintiff and defense attorneys agree that "federal court litigation is more expensive to undertake" than state court litigation).

and is no doubt one reason these defendants routinely press for a federal forum.[13]

Moreover, our system of federalism embodies the principle that state, not federal, courts should be the principal arbiters of state law. State courts have long been the primary guardians of these state-law rights, and federal law consistently has been construed to respect the vital role played by state courts. *See*, *e.g.*, *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 407 (1981) (Brennan, J., dissenting) ("state courts remain the preferred forum for interpretation and enforcement of state law"); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.").

As one commentator has explained:

> To offer a private corporation acting on its own initiative the ability to remove a case brought against it in state court to a federal forum, simply because that corporation is being paid by the federal government to provide a product, is to infringe upon a state's sovereignty by thwarting its ability to adjudicate disputes in its own judicial system. A state has an important interest in resolving cases filed in its courts. . . . The only interest significant enough to be protected by federal

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[13] *See* Gibbs, *Forum Shopping Through Federal Agent Removal Jurisdiction and CAFA*, 86-FEB Mich. B.J. 20 (Feb. 2007).

> officer removal is the interest in enforcement of federal law in support of a supreme national government.[14]

To be sure, this Court has consistently held that giving federal courts the right to resolve federal officers' official defenses in response to state-law prosecutions prevents those prosecutions from unfairly hindering the federal government in performing its job. But it is the threat that state prosecution may impede the federal government's operations that has undergirded the federal officer removal statute. *See, e.g.*, *Mesa*, 489 U.S. at 137 ("Congress' enactment of federal officer removal statutes since 1815 served 'to provide a federal forum for cases where federal officials must raise defenses arising from their official duties.'") (quoting *Willingham*, 395 U.S. at 405). However, when the federal government does not control the charged acts, as it did not here, and those same acts are subject to state prosecution when the identical products are contracted for by anyone other than the government, then arrogating jurisdiction to federal court serves no purpose.

The only policy argument advanced by the courts below for federal jurisdiction is one that should be unavailing. Both the district court and the court of appeals below voiced their concerns about

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[14] Note, *The Boyle Festers: How Lax Causal Nexus Requirements and the "Federal Contractor Defense" Are Leading to a Disruption of Comity Under the Federal Officer Removal Statute*, 46 Emory L.J. 1629, 1657 (1997) (footnotes omitted).

the capacity of state courts to handle litigation. *See* App. 41a (district court); 9a-10a (circuit court). In other words, they distrust the state court system and view expansive removal jurisdiction as a way to protect corporate defendants from the vagaries of state prosecution. But this Court has already dismissed such arguments: "We have . . . not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction . . . and we do not see any need for doing so here." *Mesa*, 489 U.S. at 137. Indeed, such a policy is antithetical to our federal system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 6, 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: June 18, 2007 Decided: February 22, 2008)
Docket Nos. 05-1820-cv; 05-1509-cv; 05-1693-cv; 05-1694-cv; 05-1695-cv; 05-1698-cv; 05-2450-cv

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Joe Isaacson and Phyllis Lisa Isaacson,

Plaintiffs-Appellants,

—v.—

Dow Chemical Co., Monsanto Co., Hercules, Inc., Occidental Chemical Corp., Ultramar Diamond Shamrock Corporation, Maxus Energy Corp., Chemical Land Holdings, Inc., T-H Agriculture and Nutrition Co., Thompson Hayward Chemical Co., Harcros Chemicals, Inc., Uniroyal, Inc., C.D.U. Holding Inc. and Uniroyal Chemical Company,

Defendants-Appellees.

J. Michael Twinam,

Plaintiff-Appellant,

—v.—

Dow Chemical Company, Monsanto Co., American Home Products, Inc., Hercules Incorporated, Occidental Chemical Corporation, Ultramar Diamond, Chemical Land Holdings, Inc., Maxus Energy Corp., Harcros Chemicals, Inc., Shamrock Corp., Thompson Hayward

Chemical Co., T-H Agriculture, Uniroyal Chemical Co. and Valero Marketing Corporation,

Defendants-Appellees.

Robert S. Bauer and Sandra J. Bauer,

Plaintiffs-Appellants,

—v.—

Dow Chemical Company, Monsanto Company, Pharmacia Corp., formerly known as Monsanto Co., Solutia, Inc., Hercules, Inc., Thompson Hayward Chemical Co., T-H Agriculture & Nutrition Co., Occidental Chemical Corporation, Occidental Petroleum Corporation, Uniroyal, Inc., C.D.U. Holding, Inc., Uniroyal Chemical Company, Harcros Chemicals, Inc., Ultramar Diamond Shamrock Corporation, Maxus Enegy Corp., Tierra Solutions, Inc. and Chemical Land Holdings, Inc.,

Defendants-Appellees.

Sheryl A. Walker, E.C.W., A minor, by his Mother and Next Friend on behalf of Sheryl A. Walker, Stephen J. Walker, William Hamilton and Esther M. Hamilton, His wife, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellants,

—v.—

Dow Chemical Company, Monsanto Company, Pharmacia Corp., Solutia, Inc., Hercules, Inc., Thompson Hayward Chemical Co., T-H Agriculture & Nutrition Co., Occidental Petroleum Corporation, Occidental Chemical Corp., Uniroyal, Inc., C.D.U. Holding, Inc., Uniroyal Chemical Company, Harcros Chemicals, Inc., Ultramar Diamond Shamrock Corporation, Maxus

Energy Corp., Tierra Solutions, Inc., Chemical Land Holdings, Inc., and Valero Energy Corporation, doing business as Valero Marketing and Supply Company,

Defendants-Appellees.

Does 1-100,

Defendants.

Sherman Clinton Stearns and Dortha Monyene Stearns,

Plaintiffs-Appellants,

—v.—

Dow Chemical Company, Hercules Inc., Occidental Chemical Corp., Thompson Hayward Chemical Co., Elementis Chemicals, Inc., T.H. Agriculture and Nutrition Company, Inc., Maxus Energy Corp., El Paso Gas Transmission Company, Valero Energy Corporation, doing busines as Valero Marketing and Supply Company and Uniroyal Chemical Company,

Defendants-Appellees.

Charles T. Anderson,

Plaintiff-Appellant,

—v.—

Dow Chemical Company, Monsanto Company, Occidental Chemical Corporation, Hercules, Inc. and Valero Energy Corporation, doing business as Valero Marketing and Supply Company,

Defendants-Appellees,

Pfizer, Inc., Solutia, Inc., E.I. Dupont de Demours & Co., Elementis Chemicals, Inc., Roche Holdings, Ltd.,

Harcros Chemicals, Inc., Crompton Corporation, Repsol-YPF, ConocoPhillips Company, Wyeth, Inc., Velsicol Chemical Corporation,

Defendants.

Vickey S. Garncarz,

Plaintiff-Appellant,

—v.—

Dow Chemical Company, Uniroyal Chemical Corp., and Occidental Chemical Corporation,

Defendants-Appellees.

BEFORE:

MINER, SACK, HALL, *Circuit Judges:*

This is one of two opinions addressing appeals from a judgment of the United Staets District Court for the Eastern District of New York (Weinstein, J.) dismissing this multidistrict litigation. This opinion concerns the March 2005 order of the district court denying plaintiffs' motions to remand seven actions to state court. Because we agree that the district court has jurisdiction over these actions under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), the order of the district court is AFFIRMED.

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HALL, *Circuit Judge*:

We are asked to determine whether the federal officer removal statute, 28 U.S.C. § 1442(a)(1), allows defendant chemical companies ("Defendants"), who contracted with the Government to produce Agent Orange for military use in the Vietnam War, to remove to federal court actions filed in state court alleging violations of state law in connection with that production. Those plaintiffs who contest federal jurisdiction claim that Defendants do not qualify as "persons" who were "acting under" a federal officer performing acts "under color of federal office" when they committed the challenged acts. We disagree. Defendants have demonstrated that they are "persons" within the meaning of the statute; that they were "acting under" a federal officer; that there is a causal connection between the formulation, manufacturing, packaging, and delivery of Agent Orange and the state prosecutions; and that they have raised a colorable federal defense to the state suits. Moreover, removal in these cases fulfills the federal officer removal statute's purpose of protecting persons who, through contractual relationships with the Government, perform jobs that the Government otherwise would have performed. *See Watson v. Philip Morris*

Cos., Inc., 127 S.Ct. 2301, 2308 (2007). We therefore affirm the orders of the district court denying the plaintiffs' motions to remand.

BACKGROUND

Our decision today on the applicability of the federal officer removal statute affects only seven of the sixteen appeals in the present litigation. The plaintiffs in these seven appeals ("Plaintiffs") filed actions in state courts in Illinois, Missouri, New Jersey, New York, and Texas in which they alleged violations of state law, and they asserted that removal would be improper because diversity of citizenship was not complete. *See* Isaacson Compl. (filed in New Jersey); Twinam Compl. (filed in New York); Bauer Compl. (filed in Missouri); Walker Compl. (filed in Missouri); Stearns Compl. (filed in Texas); Anderson Transfer Order (from complaint filed in Texas); Garncarz Compl. (filed in Illinois). Defendants removed all of the cases to the federal district courts in their respective states. After Defendants had removed the cases, the Judicial Panel on Multidistrict Litigation transferred the cases to the United States District Court for the Eastern District of New York.

The district court first dismissed all of the cases because it found that they were impermissibly attempting to attack collaterally a 1984 class action settlement of claims stemming from harms suffered by veterans as a result of their exposure to Agent Orange. On appeal, this Court, following the Supreme

Court's decisions in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), vacated the dismissal and remanded because Plaintiffs were not bound by the settlement. *See Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 259-61 (2d Cir. 2001). This Court also held that the district court had subject matter jurisdiction over the claims under the All Writs Act because, although the settlement funds were depleted, the state actions would require interpretation of the scope of the settlement and could disturb the judgment. *See id.* at 256.

The Supreme Court affirmed the judgment vacating the order of dismissal, but it vacated this Court's judgment to the extent that that judgment had affirmed the assertion of removal jurisdiction under the All Writs Act. *See Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003). The Supreme Court further directed this Court to reconsider the question of federal jurisdiction over the claims in light of *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002). *See Dow Chem. Co.*, 539 U.S. at 112. On remand, we found it "clear in light of *Syngenta* that federal jurisdiction with respect to the Isaacson's claims cannot be grounded on the All Writs Act." *Stephenson v. Dow Chem. Co.*, 346 F.3d 19, 21 (2d Cir. 2003). We therefore remanded the case to the district court for further analysis of the jurisdictional question.

Once back in the district court, Defendants moved for summary judgment, and Plaintiffs moved

to remand the actions to state court. The district court granted Defendants' motion for summary judgment, *see In re Agent Orange Prod. Liab. Litig. (Agent Orange I),* 304 F. Supp. 2d 404 (E.D.N.Y. 2004), and in a separate memorandum and order, it denied the Isaacson plaintiffs' motion to remand, because it found that jurisdiction was proper pursuant to the federal officer removal statute, *see In re Agent Orange Prod. Liab. Litig. (Agent Orange II),* 304 F. Supp. 2d 442 (E.D.N.Y. 2004). In March 2005, the district court denied the remaining motions to remand.

In its jurisdictional ruling, the district court found that Defendants had satisfied the requirements for invoking the federal officer removal statute because: (1) they were "persons" within the meaning of the statute; (2) they were "acting under color of a federal office," because the Government specified the formulation of Agent Orange, was aware that it contained dioxin, knew about the "dioxin 'problem,'" and controlled the method of warning; and (3) the government contractor defense was a colorable federal law defense. *See Agent Orange II,* 304 F. Supp. 2d at 449-51. The court further noted the policy considerations supporting removal: (1) the scattering of Agent Orange claims throughout the state courts would have a chilling effect on manufacturers' acceptance of government contracts; (2) the vagaries of state tort law would deter military procurement; and (3) state courts may circumvent *Boyle v. United Technologies Corp.,* 487 U.S. 500 (1988), the Supreme

Court's preeminent decision on the government contractor defense, if they are unsympathetic to defendants. *Agent Orange II,* 304 F. Supp. 2d at 451. The court observed that its present decision was contrary to its prior decision in *Ryan v. Dow Chemical Co.,* 781 F. Supp. 934 (E.D.N.Y. 1992), where it had held, in virtually identical circumstances and with roughly the same defendants, that the federal officer removal statute did not apply. *See Agent Orange II,* 304 F. Supp. 2d at 445. The court explained its reversal of course by noting that *Ryan* was "no longer persuasive" and that *Ryan*'s holding had been called into question by the Fifth Circuit in *Winters v. Diamond Shamrock Chemical Co.,* 149 F.3d 387, 392 (5th Cir. 1998). *See Agent Orange II,* 304 F. Supp. 2d at 445.

Plaintiffs appeal the district court's memorandum and order finding removal jurisdiction over their state law claims and the district court's later order denying all motions to remand.

DISCUSSION

We review de novo the district court's denial of the motions to remand. *See Whitaker v. Am. Telecasting, Inc.,* 261 F.3d 196, 201 (2d Cir. 2001). The federal officer removal statute provides that a case may be removed from state to federal court when the case is brought against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof,

sued in an official or individual capacity for any act under color of such office." 28 U.S.C. § 1442(a)(1). In this case, because they are not federal officers themselves, Defendants must satisfy a three-pronged test to determine whether they may effect removal. First, they must show that they are "person[s]" within the meaning of the statute who "act[ed] under [a federal] officer." *Id.* Second, they must show that they performed the actions for which they are being sued "under color of [federal] office." *Id.* Third, they must raise a colorable federal defense. *Jefferson County v. Acker*, 527 U.S. 423, 431 (1991). We consider each of these requirements in turn.

I. Corporate Persons and the "Acting Under" Requirement

To satisfy the first requirement, Defendants must show that they were "person[s] acting under" "color of" a federal officer. As an initial matter, we address whether Defendants are "persons."

A. Corporate Persons Under the Federal Officer Removal Statute

Section 1442 extends removal power to the United States, its agencies, federal officers, and persons acting under federal officers. Although Plaintiffs argued in their briefs that the defendant chemical companies do not fall under § 1442 because they are not natural persons, another panel of this Court decided, after briefs were due in this case, that corporate

persons qualify as "persons" under § 1442. *In re Methyl Tertiary Butyl Esther ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 124 (2d Cir. 2007). Although *MTBE* thus forecloses any argument that corporations are not "persons" under the federal officer removal statute, because that case did not detail its reasoning on this issue, we take this opportunity to explain that result.

By statute, we presume that the term "person" includes corporations "unless the context indicates otherwise." 1 U.S.C. § 1. The context in which the term "person" is used in § 1442 gives no indication that corporations are excluded. In fact, § 1442 also lists other non-natural entities, such as the United States and its agencies, which suggests that interpreting "person" to include corporations is consistent with the statutory scheme. The presumption is not irrebuttable, and it can be overcome where the legislative history of the statute under consideration shows that "the normal rule of construction set forth in 1 U.S.C. § 1 would run contrary to the statutory intent." *Toy Mfrs. of Am., Inc. v. Consumer Prod. Safety Comm'n*, 630 F.2d 70, 74 (2d Cir. 1980). As a federal district court in California observed in *Krangel v. Crown*, 791 F.Supp. 1436 (S.D. Cal. 1992), the legislative history of § 1442 reflects only "the absence of express congressional intent to expand the protection of the federal officer removal provision beyond all federal officers to include non-natural entities." *Id.* at 1442. The *Krangel* Court found that the term "person" did not include corporate persons

based on this absence. As noted above, however, 1 U.S.C. § 1 establishes a baseline presumption that the term "person" includes corporate persons; the legislative history of § 1442 is relevant only to the extent it reflects a contrary statutory intent. Because the legislative history is devoid of evidence suggesting that Congress intended § 1442 not apply to corporate persons, the ordinary presumption established in 1 U.S.C. § 1 controls.

The 1996 amendment of § 1442 to include agencies does not change the result. Prior to its amendment in 1996, the statute allowed removal in cases against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office." 28 U.S.C. § 1442(a)(1) (1948). As written, the pre-1996 version was unclear on whether it applied only to actions against officers or if it also applied to actions against the United States and its agencies. The amendment clarified that it applied to "[t]he United States," "any agency thereof," "any officer . . . of the United States," "any officer . . . of any agency," and "any person acting under [any such] officer." *Id.* Whether or not the term "person" included corporations was, and remains, an entirely separate issue from whether or not the statute applied to both agencies and agency officers. The 1996 modification with respect to the latter, therefore, cannot be interpreted as reflecting any preexisting understandings with respect tc the former.

Based on these considerations, we agree with the panel in *MTBE* that the term "person" includes corporate persons. We also note that in so holding, our Circuit is in agreement with the Fifth Circuit, *see Winters,* 149 F.3d at 398, and several district courts, *see Good v. Armstrong World Indus., Inc.,* 914 F. Supp. 1125, 1127-28 (E.D. Pa. 1996); *Pack v. AC & S, Inc.,* 838 F. Supp. 1099, 1102-03 (D. Md. 1993); *Fung v. Abex Corp.,* 816 F. Supp. 569, 572 (N.D. Cal. 1992).

B. The "Acting Under" Requirement

Defendants must show that they were "acting under" a federal officer. The words "acting under" are to be interpreted broadly, and the statute as a whole must be liberally construed. *See Watson,* 127 S.Ct. at 2304-05; *Willingham v. Morgan,* 395 U.S. 402, 407 (1969) ("Th[e] policy [of providing the protection of a federal forum to federal officers] should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).").

In *Watson,* 127 S.Ct. 2301, the Supreme Court expanded on what kind of relationship between the federal officer and the private actor is needed to satisfy the "acting under" requirement. There, the Court considered whether the Philip Morris Companies were "acting under" a federal officer or agency when they tested and advertised their cigarettes in compliance with the Federal Trade Commission's detailed regulations. *Id.* The Court held that they did not qualify as "acting under" a federal officer, reasoning

that the "help or assistance necessary to bring a private person within the scope of the [federal officer removal] statute does *not* include simply *complying* with the law." *Id.* at 2307. Instead, an entity "act[s] under" a federal officer when it "*assist*[*s*], or . . . help[s] *carry out,* the duties or tasks of the federal superior." *Id.* In other words, there must exist a "special relationship" between the two. *Id.* at 2310. For example, close supervision of the private entity by the Government would constitute such a special relationship:

> [T]he private contractor in such cases is helping the Government to produce an item that it needs. The assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks. In the context of [*Winters,* 149 F.3d 387], for example, Dow Chemical fulfilled the terms of a contractual agreement by providing the Government with a product that it used to help conduct a war. Moreover, at least arguably, Dow performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform.

Id. at 2308.

Similarly, in this case, Defendants contracted with the Government to provide a product that the Government was using during war – a product that, in the absence of Defendants, the Government would have had to produce itself. Unlike the tobacco companies in

Watson, Defendants received delegated authority; they were not simply regulated by federal law. Through their contracts with the Government to produce Agent Orange, the chemical companies "assist[ed]" and "help[ed] carry out[ ] the duties or tasks of" officers at the Department of Defense. *See id.* at 2307. Defendants thus had the "special relationship" with the Government required by the "acting under" prong.

II. "Under Color of" Federal Office

The second prong requires Defendants to show that the acts complained of – that is, producing dioxin through the manufacturing of Agent Orange – were taken "under color of [federal] office." 28 U.S.C. § 1442(a)(1). Over time, this second prong has come to be known as the causation requirement. *See Maryland v. Soper (No. 1),* 270 U.S. 9, 33 (1926). To satisfy this requirement as applied to a federal officer, "[i]t must appear that the prosecution of him for whatever offense has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts or conduct of his, not justified by his federal duty." *Id.* at 33. The hurdle erected by this requirement is quite low, as "[t]he statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority." *Id.* Rather, "[i]t is enough that his acts or his presence at the place in performance of his official duty constitute

the basis, though mistaken or false, of the state prosecution." *Id.* Translated to non-governmental corporate defendants, such entities must demonstrate that the acts for which they are being sued – here, the production of dioxin in Agent Orange – occurred *because of* what they were asked to do by the Government. We credit Defendants' theory of the case when determining whether a causal connection exists. *Jefferson County v. Acker,* 527 U.S. 423, 432 (1999).

We agree with the district court that the "acting under" prong is satisfied here. To show causation, Defendants must only establish that the act that is the subject of Plaintiffs' attack (here, the production of the byproduct dioxin) occurred *while* Defendants were performing their official duties. *See Willingham,* 395 U.S. at 409; *see also Soper,* 270 U.S. at 33. Defendants have made the required showing. According to their theory of the case, the Government knew that Agent Orange contained dioxin, and the Government controlled the method of formulation. The action that Plaintiffs challenge, the production of dioxin, naturally would have occurred during the performance of these government-specified duties. And even if Plaintiffs were to prove that the dioxin contamination occurred because of an act not specifically contemplated by the government contract, it is enough that the contracts gave rise to the contamination. Indeed, whether the challenged act was outside the scope of Defendants' official duties, or whether it was specifically directed by the federal Government, is one for

the federal – not state – courts to answer. *See Willingham,* 395 U.S. at 409.

Plaintiffs' arguments to the contrary are unpersuasive. They first claim that Agent Orange was an off-the-shelf product and, therefore, could not have been manufactured under color of federal office. As we point out in our companion opinion, however, commercially available products did not contain the Agent Orange herbicides in a concentration as high as that found in Agent Orange. *See In re "Agent Orange" Prod. Liab. Litig.,* ___ F.3d ___ (2008). Plaintiffs' off-the-shelf argument thus fails.

Plaintiffs also suggest that the production of Agent Orange was not under color of federal office because Defendants voluntarily bid for the government contracts under which they produced Agent Orange. We find no authority for the suggestion that a voluntary relationship somehow voids the application of the removal statute. To require the relationship to have been not only "special" but also coerced makes little sense in light of the statute's purpose, and it is particularly strange when applied to natural persons who are acting under a federal officer – all of whom, we would trust, are doing so voluntarily.

In light of the broad interpretation that we must afford the requirement that there be a causal connection between Defendants' federal duties and the conduct for which they are being sued, Defendants have satisfied the "acting under" prong of the statute.

III. Colorable Federal Defense

Finally, Defendants must raise a colorable federal defense. *Jefferson County,* 527 U.S. at 431; *Mesa v. California,* 489 U.S. 121, 132-34 (1989). The district court found that Defendants had raised a colorable government contractor defense. *Agent Orange II,* 304 F.Supp.2d at 450. As described more fully in our companion opinion, the government contractor defense protects a government contractor from liability under state tort law when the Government approved the product's general design, the product conformed to that design, and the contractor warned the Government of the risks of the product. *See In re "Agent Orange" Prod. Liab. Litig.,* ___ F.3d ___ (2008).

Courts have imposed few limitations on what qualifies as a colorable federal defense. At its core, the defense prong requires that the defendant raise a claim that is "defensive" and "based in federal law." *Mesa,* 489 U.S. at 129-30. More specifically, such defense must "aris[e] out of [the party's] official duties." *Arizona v. Manypenny,* 451 U.S. 232, 241 (1981). Given that the removal statute more generally is "not 'narrow' or 'limited' " and that one of its purposes is "to have such defenses litigated in the federal courts," the federal defense requirement is satisfied in "all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Willingham,* 395 U.S. at 406-07. To be "colorable," the defense need not be "clearly sustainable," as the purpose of the statute is to secure that

the validity of the defense will be tried in federal court. *Id.* at 407.

The government contractor defense, which is a creature of federal common law and serves to protect the interests of the Government rather than the contractor defendant, *see In re "Agent Orange" Prod. Liab. Litig.*, ___ F.3d ___ (2008), is "defensive" and "federal," *Mesa,* 489 U.S. at 129-30. Moreover, as asserted by Defendants in this case, the defense clearly "ar[ose] out of [Defendants'] duty" pursuant to their contractual relationship with the Federal Government. *Willingham,* 395 U.S. at 407; *see also Manypenny,* 451 U.S. at 241. And as found by the district court, Defendants' assertions satisfy the particular requirements of the defense. *Agent Orange II,* 304 F. Supp. 2d at 450.

Plaintiffs object, however, based on an argument that (1) only "official immunity defenses" qualify as "colorable federal defenses," and (2) the government contractor defense is not an "official immunity defense" and, therefore, cannot satisfy the federal defense requirement. Contrary to Plaintiffs' claims, we find no support for the proposition that only "official immunity defenses" satisfy the "colorable federal defense" requirement. Although *Willingham* states that "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court," 395 U.S. at 407, the Court proffers official immunity as only one reason for removal; it does not limit removal to situations that involve official immunity. Furthermore, in

Mesa, the Supreme Court confirms that in *Cleveland, Columbus & Cincinnati. R.R. v. McClung,* 119 U.S. 454 (1886), the defendant, a federal customs collector being sued for violation of his federal duty, satisfied the colorable federal defense requirement, not by asserting official immunity, but by defending on the basis that federal law did not impose any such duty. *Mesa*, 489 U.S. at 129-30. Compliance with federal law, therefore, provides a colorable federal defense under some circumstances, but it is not coterminous with an immunity defense.

Because we find that a defense need not be an immunity defense to qualify as a colorable federal defense under the removal statute, we need not decide here whether the government contractor defense is an immunity defense – an issue on which courts have disagreed. *Compare Murray v. Northrop Grumman Info. Techs., Inc.,* 444 F.3d 169, 175 (2d Cir. 2006) (citing *Boyle* as analogous to the holding that a private contractor administering a congressional job training program for Irish nationals was entitled to official immunity from state tort liability), *Densberger v. United Tech. Corp.,* 297 F.3d 66, 75 (2d Cir. 2002) (noting that *Boyle* "extended the immunity afforded to the federal government's discretionary functions under the Federal Tort Claims Act to government contractors"), *and Kerstetter v. Pac. Scientific Co.,* 210 F.3d 431, 435 (5th Cir. 2000) ("Government contractor immunity is derived from the government's immunity from suit where the performance of a discretionary function is at issue."), *with United States ex rel. Ali v.*

Daniel, Mann, Johnson & Mendenhall, 355 F.3d 1140, 1147 (9th Cir. 2004) ("[T]he government contractor defense does not confer sovereign immunity on contractors."), *and In re Joint E. & S. Dist. N.Y. Asbestos Litig. (Grispo v. Eagle-Picher Indus., Inc.),* 897 F.2d 626, 631 (2d Cir. 1990) (noting that *Boyle* did not grant military contractors "blanket immunity," but rather "hinge[d] the military contractor defense upon the military contractor's having followed a government-approved requirement contrary to a state tort law duty").

* * *

The district court properly found that it had jurisdiction over the present actions under the federal officer removal statute. Defendants are "persons" within the meaning of the statute who are entitled to stand in the shoes of a federal officer because of the "special relationship" they shared with the Government. The production of dioxin occurred "under color of [federal] office" because it occurred while Defendants were performing their "official" duty, pursuant to government contract, of manufacturing Agent Orange. Finally, Defendants have adequately raised the government contractor defense, which qualifies as a colorable federal defense.

CONCLUSION

The order of the District Court denying Defendants' motions to remand is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION	:	MDL No. 381
JOE ISAACSON and PHILLIS LISA ISAACSON, Plaintiffs, -against- DOW CHEMICAL COMPANY, et al., Defendants.	:	MEMORANDUM & ORDER (REMOVAL) 98-CV-6383 (JBW) (Filed Feb. 12, 2004)

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I. Introduction

Plaintiff, Joe Isaacson, is a Vietnam veteran. He claims injuries from exposure to Agent Orange during his service in Vietnam from 1968 to 1969. Defendants manufactured and sold Agent Orange to the United States for use by the military as a defoliant in Vietnam. This case has been remanded to determine whether there is federal jurisdiction. *See Stephenson v. Dow Chemical Co.*, 346 F.3d 19 (2d Cir. 2003).

Originally filed in New Jersey state court, the complaint alleged claims under state law only. Defendants removed the case to federal court, asserting a variety of jurisdictional grounds: 28 U.S.C. §§ 1651 (All Writs Act), 1442 (acting under federal officer), 1332 (diversity), and 1331 (federal question). The District Court for the District of New Jersey approved removal based on the All Writs Act, 28 U.S.C. § 1651. The case was then transferred to this court by the Multidistrict Panel. MDL 381. The Court of Appeals for the Second Circuit approved removal solely on the basis of the All Writs Act. *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001).

The Supreme Court remanded in light of its holding in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002), indicating that the All Writs Act alone would not support removal. *Dow Chemical Co. v. Stephenson*, 123 S. Ct. 2161 (2003) (per curiam). On remand from the Supreme Court, the Second Circuit determined that jurisdiction could not be grounded in the All Writs Act and remanded the case to this court

to determine if there is an alternate ground supporting federal jurisdiction. *Stephenson v. Dow Chemical Co.*, 346 F.33d 19 (2d Cir. 2003).

Pending is plaintiff's motion to remand the case to state court on the ground that there is no basis for federal jurisdiction. Defendants contend that the case is removable.

It would not be removable on diversity grounds since diversity of parties is lacking. Nor would it be removable on the ground that plaintiffs have stated a federal cause of action since the Court of Appeals by a split decision disagreed with this court that federal substantive law was the predicate for Agent Orange claims. *See In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). The only other basis is the federal officer removal statute. 28 U.S.C. § 1442(a)(1).

For reasons indicated below, the motion to remand is denied. Federal jurisdiction is properly asserted under the federal officer removal statute. A prior decision of this court reached a contrary conclusion in an Agent Orange case. *See Ryan v. Down Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992). The *Ryan* decision is no longer persuasive. As the Court of Appeals for the Fifth Circuit pointed out in rejecting *Ryan*'s conclusion, this court recognized its decision on the point as "close" and "uncertain." *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 392 (5th Cir. 1998). *Ryan* was "not legally capable of appellate review." *Id. Winters*, a persuasive appellate

decision, on facts almost identical to those in *Ryan* held the federal officer removal statute applicable to the defendants in the instant case. *Id.* at 401; *see also Miller v. Dow Chemical Co.*, 275 F.3d 414, 417 (5th Cir. 2001) (same).

II. Facts

The facts supporting removal of the case on the basis of the federal officer removal statute are set forth in extensive contractual and other documents. *See In re "Agent Orange" Products Liability Litigation*, Judgment and Order of Dismissal, ___ F. Supp. 2d ___ (E.D.N.Y. Feb. 9, 2004) ("*Judgment in Agent Orange III*"). *Judgment in Agent Orange III* contains a description of the relevant facts. It is deemed incorporated in this memorandum and order.

III. Law

A. General Rule

The federal officer removal statute allows executive branch officials and persons acting under them to remove to a federal court civil and criminal actions brought against them in a state court for their official acts. The relevant portion of Section 1442(a)(1) of Title 28 of the Untied States Code reads:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the

> district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office. . . .

The statute has its origins in Congress's response to the New England states' opposition to the War of 1812. *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). Its reach was extended through the years, taking its current form in the enactment of the Judicial Code of 1948. *Mesa v. California*, 489 U.S. 121, 126 (1989).

Section 1442(a)(1) is designed to prevent state courts from interfering with the implementation of federal law. It does so by allowing those whose activities on behalf of the federal government may be inhibited by state court actions to remove the cases to a presumably less biased federal forum. If one defendant may remove under section 1442, then the entire case is removed to federal court even if some defendants could not have removed the case under the statute. *See, e.g., Falls Riverway Realty v. City of Niagra Falls*, 754 F.2d 49, 52 (2d Cir. 1985) (noting that one government defendant removed the "entire case"); 3 Moore's Federal Practice ¶ 1442.2. Subject matter jurisdiction is conferred over properly removed actions. *Niagra Mohawk Power Corp. v. Bankers Trust Co.*, 791 F.3d 242, 244 (2d Cir. 1986).

In general, lawsuits may be removed from state court to federal court only if a federal district court would have had original jurisdiction over the suit – the "well pleaded complaint rule." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). The federal officer removal statute expands the scope of federal jurisdiction; an action may be properly removed if it satisfies three elements. *See, e.g., Mesa*, 489 U.S. at 136 ("The removal statute itself merely serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged.").

First, a defendant must demonstrate that it is a "person" within the meaning of the statute. Second, the defendant must establish that the suit is "for any act under color of [federal] office," i.e., there is a "causal connection between the charged conduct and asserted official authority." *Willingham*, 395 U.S. at 409 (citations omitted). Causation exists if the predicate acts of the state suit were undertaken while a person was acting as or under a federal officer, and the acts were under color of the relevant federal office. *Ryan*, 781 F. Supp. at 939. Third, defendants must raise a colorable claim to a federal law defense. *Mesa*, 489 U.S. at 131-38.

Defendants claim to have been persons "acting under" federal officers within the meaning of section 1442(a)(1) when they manufactured and delivered to the Department of Defense for use in war the herbicides that plaintiff alleges injured him. The primary question in the instant case is whether defendants'

conduct allegedly giving rise to plaintiffs' state law claims constituted acts under a federal officer within the meaning of section 1442(a)(1).

B. Elements of Section 1442(a)(1)

1. Definition of Person

"[U]nless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, . . . , and joint stock companies, as well as individuals. . . ." 1 U.S.C. § 1. The Supreme Court has not ruled on whether corporations can be considered persons under the federal officer removal statute. In its most recent explication of the meaning of "person," the Court held that a federal agency was not a person under the statute. *Int'l Primate Protection League v. Adm'r of Tulane Educ. Fund*, 500 U.S. 72 (1991). Responding to the *International Primate* decision, Congress amended the statute to allow for removal by federal agencies. Federal Courts improvement Act of 1996, Pub. L. 104-317, 110 Stat. 3847, 3850; *see also Nebraska ex. rel Dept. of Soc. Servs. v. Bentson*, 146 F.3d 676, 678 (9th Cir. 1998); *Dalrymple v. Grand River Dam Auth.*, 145 F.3d 1180, 1184 n.6 (10th Cir. 1998) (deeming the amendment a legislative reversal of *International Primate*).

Congress's amendment of the statute to emphasizes its broad scope supports the conclusion that "person" encompasses more than mere individuals. Protection of federal government operations in today's organizational climate where so much of our economy

and government outsourcing depends upon corporations requires this result. Under section 1442(a)(1) a "person" includes a corporation. *See Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998); *Thompson v. Comm. Ins. Co.*, 1999 U.S. Dist. LEXIS 21725 (S.D. Ohio 1999); *Arness v. Boeing N. Am., Inc.*, 997 F. Supp. 1268, 1272 (C.D. Cal. 1998); *Ruffin v. Armco Steel Corp.*, 959 F. Supp. 770, 773 (S.D. Tex. 1997); *Good v. Armstrong World Indus.*, 914 F. Supp. 1125, 1127-1128 (E.D. Pa. 1996); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992); *Akin v. Big Three Indus., Inc.*, 851 F. Supp. 819, 822-23 (E.D. Tex. 1994); *Ryan*, 781 F. Supp. at 946-47.

2. Acting Under Color of Federal Office

The "color of office" requirement should not be frustrated by a "narrow" construction. Courts interpret the rule broadly to achieve the protective purpose of the statute. *Willingham*, 395 U.S. at 407. This element requires a causal nexus between the defendant's actions under federal office and plaintiff's state court claims. *Id.* at 409; *Winters*, 149 F.3d at 398. A substantial degree of direct and detailed federal control over the defendant's work is required. *Winters*, 149 F.3d at 398; *Arness*, 997 F. Supp. at 1273.

Cases applying section 1442(a)(1) involving defense contractors support the defense's contentions in the present litigation. In *Winters*, for example, plaintiffs sued Agent Orange manufacturers under

almost identical facts. *See Judgment in Agent Orange III*. Defendants sought removal. The court determined that it was sufficient that the government specified "the composition of Agent Orange so as to supply the causal nexus between the federal officer's directions and the plaintiff's claims." *Winters*, 149 F.3d at 398. Central to the court's holding was a finding identical to that in the instant case – "that the government maintained strict control over the development and subsequent production of Agent Orange." *Id.* at 399.

The Fifth Circuit approved removal based on the federal officer statute in a subsequent Agent Orange case. *Miller v. Dow Chemical Co.*, 275 F.3d 414, 417 (5th Cir. 2001). By contrast – unlike the case at bar – federal control was almost nonexistent in *Arness v. Boeing North American*. The plaintiffs had sued Boeing based on Boeing's disposal of a toxic substance used to "flush rocket engine hardware." 997 F. Supp. at 1273. Government specifications required Boeing to clean the engines with a toxic substance, but did not specify how Boeing was to dispose of the cleanser. The court found that a federal officer did not direct or control Boeing's disposal of the toxin, and, thus, there was no connection between the plaintiff's claims and Boeing's actions at the direction of a federal officer. *Id.* at 1275.

Akin v. Big Three Indus., Inc., illustrates a properly removable case. 851 F. Supp. 819 (E.D. Tex. 1994), *removal aff'd by Akin v. Ashland Chemical Co.*, 156 F.3d 1030 (10th Cir. 1998). A corporate

manufacturer of jet engines was involved in a toxic tort case arising out of chemical exposure at an Air Force base. The defendants produced the jet engines in accordance with government specification. Repairing the engines involved a grinding process, which necessarily gave rise to the emission of objectionable chemicals. The court held that the "acting under" requirement is satisfies when "a government contractor builds a product pursuant to Air Force specifications and is later sued because compliance with those specifications allegedly causes person injuries. *Id.* at 823-24. Likewise, in *Crocker v. Borden*, the claim was based on exposure to asbestos while the plaintiffs were shipyard employees. 852 F. Supp. 1322 (E.D. La. 1994). Defendants utilized asbestos as insulation in marine turbines. The marine turbines were manufactured pursuant to government specifications for the Navy. The court held that this government control established the necessary "causal nexus." *Id.* at 1327. *See also, e.g., Reed v. Fina Oil & Chemical Co.*, 995 F. Supp. 705 (E.D. Tex. 1998) (government dictated processes through which the victim initially came into contact with chemicals allegedly causing disease; government controlled specifications of chemicals); *Pack v. AC and S, Inc.*, 838 F. Supp. 1099 (D. Md. 1993) (government had extensive control over manufacture of turbines, even specifying type of asbestos cloth).

The "causal nexus" is also satisfied when there is evidence of intimate government involvement in the design decisions causally related to the alleged tort.

As stated in *Arness*, defendants must show that the government directed the actions on which the plaintiffs based their claims. 997 F. Supp. at 1275. By contrast, in *Good v. Armstrong World Industries, Inc.*, plaintiffs sued for injuries related to asbestos exposure. 914 F. Supp. 1125 (E.D. Pa. 1996). The court found that the Navy was involved in the design and manufacture of the turbines, but that it did not specify the use of asbestos. Acting under the general direction of the Navy "is not the same as acting under the direct and detailed control of a federal officer." *Id.* at 1129. *But cf. Crocker v. Borden*, 852 F. Supp. 1322 (1994) (opposite holding under similar facts). Similarly, in *Anderson v. Avondale Indus., Inc.*, defendant's attempt at removal was defeated by an inability to prove "intimate government oversight or involvement in the design or production of [a lagging adhesive]." 1994 U.S. Dis. LEXIS 17598, *10 (E.D. La. 1994).

3. Colorable Claim to a Federal Law Defense

Removal "must be predicated on the allegation of a colorable federal defense." *Mesa*, 489 U.S. at 129. In deciding whether a defendant has such a defense, courts reject a "narrow, grudging interpretation;" they do not require that the defense is likely to be successful on the merits. *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) (citation omitted).

Support of removal may be predicated on the federal government contractor defense. *See, e.g. Judgment in Agent Orange III*; *Winters*, 149 F.3d at 401; *Miller*, 275 F.3d at 418; *Guillory v. Ree's Contract Serv., Inc.*, 872 F. Supp. 344, 346 (S.D. Miss. 1994) (denying removal on other grounds); *Crocker*, 852 F. Supp. at 1327; *Akin*, 851 F. Supp. at 823; *AC & S, Inc.*, 838 F. Supp. at 1103; *Fung v. Abex Corp.*, 816 F. Supp. 569, 573 (N.D. Cal. 1992). *But see Freiberg v. Swinerton & Walberg Prop. Servs.*, 245 F. Supp. 2d 1144, 1151 n.5 (D. Colo. 2002) (questioning "whether the government contractor 'defense' asserted by Swinerton here is the type of federal interest or immunity for which § 1442(a)(1) was intended to provide an exclusively federal forum").

IV. Application of Law to Facts

Defendants corporations are persons under Section 1442(a)(1).

The government designed, controlled, and supervised the production of Agent Orange as a product vital to the prosecution of the war in Vietnam. *See Judgment in Agent Orange III*. Formal military specifications and requirements for Agent Orange were prepared and promulgated by the government. After the testing of many different herbicides, the military concluded that a mixture of the butyl esters of 2,4-D and 2,4,5-T was most effective for military defoliation purposes. Federal officers determined through government specifications that the "formulation" for Agent

Orange would be a 50/50 mix of the n-butyl esters of 2,4-D and 2,4,5-T. The government determined that "extremely high dose rates" of these undiluted herbicides were required for effective military use.

Commencing in 1961, defendants produced and delivered Agent Orange to the United States pursuant to numerous contracts entered into with the Defense General Supply Center, the Defense Fuel Supply Center, the United States Army or the United States Air Force. The contracts set forth or incorporated by reference detailed specifications for the herbicide. Those specifications were promulgated by the government. A government directive issued pursuant to Section 101 of the Defense Production Act of 1950 commandeered the United States industry's entire capacity to manufacture 2,4,5-T, ordering defendants to accelerate the delivery of Agent Orange. *See, e.g., Hercules, Inc. v. United States*, 516 U.S. 417, 419 (1996) ("The military prescribed the formula and detailed specifications for manufacture.") The government also strictly and precisely defined the markings that were to be placed on drums of Agent Orange supplied by defendants, prohibiting the placement of warnings.

The government was aware of the dioxin in Agent Orange. It knew more about its dangers than defendants. The herbicidal properties of 2,4-D and 2,4,5-T were explored in research conducted by the United States military during World War II. In the 1950s, scientists at the Army Chemical Corps Warfare Laboratories located at Edgewood Arsenal, Maryland

learned of dioxin as a toxic by-product in the manufacture of 2,4,5-T. The President's Science Advisory Committee ("PSAC"), an organization within the White House, was briefed by the military on the Vietnam defoliation program in 1963 and recognized dioxin as an element in Agent Orange.

As the Court of Appeals for the Fifth Circuit concluded in *Winters* and *Miller*, the Agent Orange supplied to the government was not a ready-to-order, preexisting or off-the-shelf chemical mixture. The court noted in *Winters*:

> Although the defendants had produced 2,4-D and 2,4,5-T for commercial use before government involvement, their commercial formulations were never composed of a mixture of 100% pure 2,4-D/2,4,5-T, which the government required for the most part (98% for 2,4-D and 99% for 2,4,5-T) in its contracts with the defendants. Instead, the defendants had always included a substantial percentage of inert ingredients to dilute the two active ingredients and required further dilution before commercial application. In contrast, the government's specifications for Agent Orange included use of the two active chemicals in unprecedented quantities for the specific purpose of stripping certain areas of Vietnam of their vegetation. To quickly achieve this goal, the government dictated that Agent Orange contain only the active

> ingredients 2,4-D and 2,4,5-T and it applied the product in Vietnam without dilution.

Winters, 149 F.3d at 399; *see also Miller*, 275 F.3d at 419.

This case is distinguishable from *Arness v. Boeing North American*. As already noted, in *Arness*, defendants were sued based on the effect of their method of disposal of a toxic by-product. 997 F. Supp. At 1273. The government had not specified the manner in which the toxic by-product would be disposed of. Here, the government ordered specifications that differed from defendants' commercial applications. In addition, the method of warning and application was completely in the government's hands.

The government's full knowledge of the dioxin "problem" inherent in the production of Agent Orange is evidence that the federal officials maintained control over the acts on which the litigation is based. *See Miller*, 275 F.3d 418; *Winters*, 149 F.3d at 400. *See also, e.g., Akin v. Big Three Indus., Inc.*, 851 F. Supp. 918 (E.D. Tex. 1994); *Pack v. AC and S, Inc.*, 838 F. Supp. 1099 (D. Md. 1993); *Fung v. Abex Corp.*, 816 F. Supp. 569 (N.D. Cal. 1992); *Judgment in Agent Orange III*.

The final element of removal under Section 1442(a)(1) is whether defendants have established a "colorable federal [law] defense." *Mesa v. Califronia*, 489 U.S. 121, 129 (1989). Although the Supreme Court has stated that "one of the most important reasons for removal is to have the validity of the

defense of official immunity tried in a federal court," *Willingham*, 395 U.S. at 407, the Court did not limit the scope of federal law defenses in removal cases to immunities. The government contractor defense is a colorable federal law defense in much the same way self-defense is a colorable state law defense to civil assault charges. In an assault case, the defendant may claim: "He made me do it;" here a defendant may properly assert, "'The Government made me do it.'" *In re Joint Eastern and Southern Dist. New York Asbestos Litigation (Grispo v. Eagle-Picher Indsustries, Inc.)*, 897 F.2d 626, 632 (2d Cir. 1990).

An element of the government contractor defense is that the contractor must inform the government of any dangerous consequences known to it but not to the government. This requirement is satisfied in the present case. *See Judgment Agent Orange III*; *see also, e.g., Winters*, 149 F.3d at 401.

The defendants have satisfied all elements for removal to federal court based on section 1442(a)(1) of Title 28 of the United States Code. As "persons" acting under a federal officer, in the Agent Orange litigation, defendants were proxies for the government.

V. Policy Considerations Supporting Removal

The military contractor defense is based upon substantive policy considerations as well as pragmatic procedural factors in controlling litigation. The government contractor defense provides substantive

protection for the armed forces and its suppliers. *See Boyle v. Untied Technologies Corp.*, 487 U.S. 500, 512 (1988). Section 1442(a)(1) provides procedural protection. Failure to apply the federal officer removal statute would allow into the back door of state litigation what the government contractor defense barred at the front door.

If cases such as those in the present wave of Agent Orange claims were scattered throughout state courts manufacturers would have to seriously consider whether they would serve as procurement agents to the federal government. Since the advent of Agent Orange litigation in 1979, mass tort law has become more hazardous for defendants. While on balance state tort law does more good than harm, its vagaries and hazards would provide a significant deterrent to necessary military procurement.

Because government contractor cases are freighted with factual findings, *Boyle*, while laying down a substantive rule, may be readily circumvented by state courts unsympathetic to the defendants. Central to "Congress' concern [was] local hostility to federal authority." *Mesa*, 489 U.S. at 140 (BRENNAN, J., concurring). "Congress has decided that federal officers, and indeed, the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)." *Willingham*, 395 U.S. at 407. While there are theoretical protections in the Supreme Court's power to directly review a state court's decision prejudicial to

the federal government and its contractors, very few cases can be reviewed by this route. *Cf.* Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 Colum. L. Rev. 1888, 1918 (2003) (noting that in habeas corpus cases that "the task of error-correction, once the province of the Supreme Court on direct review, has been farmed out to the district courts.").

VI. Conclusion

Plaintiffs' motion to remand is denied. No costs or disbursements.

SO ORDERED.

/s/ Jack B. Weinstein
Jack B. Weinstein

Dated February 9, 2004
Brooklyn, New York

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DANIEL PATRICK MOYNIHAN
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK 10007

[CATHERINE O'HAGAN WOLFE,
CLERK Letterhead]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of May two thousand eight.

Nos. 05-1820-cv, 05-1509-cv, 05-1693-cv, 05-1694-cv, 05-1695-cv, 05-1698-cv, 05-2450-cv.

Appellants having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: _____
Frank Perez, Deputy Clerk

Supreme Court, U.S.
FILED
JAN 26 2009
OFFICE OF THE CLERK

17 (2)

No. 08-460

In the Supreme Court of the United States

JOE ISAACSON, ET AL.,

Petitioners,

v.

DOW CHEMICAL COMPANY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to The United States Court Of Appeals for the Second Circuit

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether federal contractors who manufactured a product that was designed by the federal government for use in military operations, and who were compelled to supply that product to the United States under the since-lapsed Defense Production Act of 1950, 64 Stat. 798 (codified at 50 U.S.C. App. § 2061 *et seq.*), were entitled to invoke the federal officer removal statute, 28 U.S.C. § 1442(a)(1), to remove from state to federal court suits asserting state-law claims arising from the production process.

RULE 29.6 STATEMENT

Respondent Monsanto Company has no parent company, and no publicly-held company owns 10 percent or more of its stock.

Respondent The Dow Chemical Company has no parent company, and no publicly-held company owns 10 percent or more of its stock.

Respondent Occidental Chemical Corporation, the successor by merger to Diamond Shamrock Chemicals Company (which was known prior to September 1, 1983 as Diamond Shamrock Corporation), is an indirect, wholly-owned subsidiary of Occidental Petroleum Corporation, a publicly-held company.

Respondent Valero Energy Corporation, the successor by merger to Ultramar Diamond Shamrock Corporation, has no parent company, and no publicly-held company owns 10 percent or more of its stock.

Respondent Maxus Energy Corporation is an indirect, wholly-owned subsidiary of YPF S.A. Approximately 85 percent of YPF S.A.'s stock is owned by Repsol YPF S.A., a publicly-held company.

Respondent Tierra Solutions, Inc., formerly known as Chemical Land Holdings, Inc., is an indirect, wholly-owned subsidiary of YPF S.A. Approximately 85 percent of YPF S.A.'s stock is owned by Repsol YPF S.A., a publicly-held company.

Respondent Hercules Incorporated is wholly owned by Ashland Inc., a publicly-held company.

Respondent Uniroyal, Inc. is a dissolved corporation.

Respondent C.D.U. Holdings, Inc. is a dissolved corporation.

Respondent Uniroyal Chemical Corp. is wholly owned by the Crompton Corporation, a publicly-held company.

Respondent T H Agriculture & Nutrition Company, Inc. (now known as T H Agriculture & Nutrition L.L.C.) is a wholly-owned subsidiary of Philips Electronics North America Corporation. Philips Electronics North America Corporation is an indirect wholly-owned subsidiary of Koninklijke Philips Electronics N.V., a publicly-held company.

Respondent Thompson-Hayward Chemical Co. is a subsidiary of Harcros Chemicals Inc.

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BRIEF IN OPPOSITION

STATEMENT

These cases arise out of petitioners' state-law claims that they were injured by exposure to the chemical 2,3,7,8-tetrachlorodibenzo para dioxin ("dioxin"), trace amounts of which were present in various herbicides – collectively referred to here as "Agent Orange" – that respondents produced for use by the U.S. military during the Vietnam War. In *Stephenson* v. *Dow Chemical Co.*, 517 F.3d 76 (2d Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3242 (U.S. Oct. 6, 2008) (No. 08-461), the Second Circuit rejected those claims on the merits, holding them barred by the federal government contractor defense. The question posed by the petition here is whether the Second Circuit was correct in also holding that removal of these cases from state to federal court was proper under 28 U.S.C. §1442(a)(1), which permits removal by federal officers and those acting under them.

That question does not merit this Court's consideration. The decisions of the courts below favoring removal, which rested on the close control the government exercised over the production of Agent Orange, plainly are correct. Petitioners do not even assert a conflict in the courts of appeals on the question presented, and they are incorrect in contending that the district courts are confused on the standards governing removal under Section 1442(a)(1). Moreover, the lower courts have not yet had an opportunity to consider the impact of this Court's recent decision in *Watson* v. *Philip Morris Cos.*, 551 U.S. 142, 127 S. Ct. 2301 (2007), which is the first time the Court has addressed application of Section 1442(a)(1)

to a private entity; that makes review of the question presented here premature. And even if the Court were otherwise inclined to consider the issue, unique features of this case – among them, that the government invoked the since-lapsed Defense Production Act of 1950 (the "DPA"), 64 Stat. 798 (codified at 50 U.S.C. App. §§ 2061 *et seq.*), to *compel* respondents to produce Agent Orange – make it an especially ill-suited vehicle with which to resolve any question of general importance regarding the scope of federal-officer removal. Further review accordingly is not warranted.

1. The background regarding the development of Agent Orange and the procedural history of early Agent Orange litigation are set out in the brief in opposition to the petition for certiorari in No. 08-461, *Stephenson* v. *Dow Chemical Co.*[1] In brief, and insofar as is relevant here, the U.S. military used Agent Orange as a herbicide during the war in Vietnam to prevent enemy forces from concealing themselves and ambushing American, South Vietnamese, and other allied soldiers. The strategy is credited with saving the lives of thousands of allied troops. See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187, 192-93 (2d Cir. 1987) (Agent Orange's "success as a herbicide saved many, perhaps thousands of, lives").

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[1] Petitioners' statement of facts is misleading in significant respects. To offer one example, petitioners label it "uncontested" that "the United States government officials involved in the procurement process were not aware of the existence of dioxin in the final product they had contracted for." Pet. 6. In fact, as the district court noted, "[t]he government was aware of the dioxin in Agent Orange." Pet. App. 37a. See *id.* at 17a ("According to [respondents'] theory of the case, the Government knew that Agent Orange contained dioxin[.]").

The herbicidal properties of the components of Agent Orange, 2,4-dichlorophenoxyacetic acid ("2,4-D") and 2,4,5-trichlorophenoxyacetic acid ("2,4,5-T"), had been discovered by the U.S. military during the Second World War, and it was the military that "developed these compounds as weapons of war." *In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d 404, 426 (E.D.N.Y. 2004), aff'd, 517 F.3d 76 (2d Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3242 (U.S. Oct. 6, 2008) (No. 08-461).

As the defoliation program got underway, "[t]he government designed, controlled, and supervised the production of Agent Orange as a product vital to the prosecution of the war in Vietnam." Pet. App. 36a. Although respondents "'had produced 2,4-D and 2-4,5-T for commercial use before government involvement, their commercial formulations were never composed of a mixture of 100% pure 2,4-D/2,4,5-T, which the government required for the most part.'" *Id.* at 38a (quoting *Winters* v. *Diamond Shamrock Chem. Co.*, 149 F.3d 387, 399 (5th Cir. 1998)). Thus, "the Agent Orange supplied to the government was not a ready-to-order, preexisting or off-the-shelf chemical mixture." *Ibid.* Instead, as Judge Jack Weinstein, the district judge below, explained, "[f]ederal officers determined through government specifications that the 'formulation' for Agent Orange would be a 50/50 mix of the n-butyl esters of 2,4-D and 2,4,5-T." *Id.* at 36a-37a. As a consequence, respondents' contracts with the government "set forth or incorporated by reference detailed specifications for the herbicide." *Id.* at 37a.

Eventually, as the defoliation program accelerated, the government compelled respondents to produce Agent Orange under the DPA. See Pet. App.

37a. That statute, which by its terms expired on September 30, 1990 (see 50 U.S.C. App. § 2166(a)), granted the President the authority to "to require acceptance and performance" of "contracts or orders" deemed "necessary or appropriate to promote the national defense." 50 U.S.C. App. § 2071(a). Regulations promulgated under the DPA by the Business and Defense Services Administration required that every government order bearing a "rating" be "accepted and filled regardless of existing contracts and orders," on pain of criminal penalties. BDSA Reg. 2, §§ 10, 27, A907, A910.[2] Virtually all of respondents' contracts with the government were rated. A912, A917-18, A935-36. Ultimately, the government applied the DPA to effectively "commandeer[] the United States industry's entire capacity to manufacture 2,4,5-T [and] ordered [respondents] to accelerate the delivery of Agent Orange" (Pet. App. 37a), in 1967 directing each manufacturer to use its entire plant capacity for production of Agent Orange. See, *e.g.*, A935-36, A965, A967, A1325-26, A1485.

2. Some years after the Vietnam War ended, veterans and members of their families brought a class action against respondents, claiming that they had been injured by exposure to dioxin, an unwanted byproduct of the Agent Orange production process, present in minute quantities measurable in parts per million (the average dioxin content was 1.58 parts per million by weight). See *In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d at 424; see also *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187 (litigation by class action opt-outs); *Ivy* v. *Diamond*

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[2] "A___" refers to the defendants-appellees' appendix in the Second Circuit.

Shamrock Chems. Co., 996 F.2d 1425 (2d Cir. 1993) (litigation by class members who manifested injury after class action settlement but were nevertheless held subject to the bar of the settlement). More recently, a different group of plaintiffs brought additional actions against respondents, arguing that they were not bound by the class action settlement because they did not manifest injury until after the class settlement funds were exhausted in 1994. See Pet. App. 7a. This new group of plaintiffs included petitioners here, who initially brought their suits in various state courts. Defendants removed the suits to federal court and, along with actions initiated in federal court, the cases were consolidated in the Eastern District of New York pursuant to order of the Judicial Panel on Multi-District Litigation. *Ibid.* The district court held that the 1984 settlement barred these new plaintiffs' actions.

On appeal, the Second Circuit held that the federal courts had jurisdiction over petitioners' actions under the All Writs Act but reversed the district court's ruling that the post-1994 plaintiffs were bound by the class settlement, finding instead that they had not been adequately represented in the proceedings leading to the settlement. This Court affirmed the latter ruling by an equally divided Court, but it reversed the holding predicating federal jurisdiction on the All Writs Act, in light of its decision in *Syngenta Crop Protection, Inc.* v. *Henson*, 537 U.S. 28 (2002). It accordingly remanded the removed cases for reconsideration of the propriety of removal. See *Dow Chem. Co.* v. *Stephenson*, 539 U.S. 111 (2003) (per curiam); Pet. App. 8a. The Second Circuit then returned the cases to the district court for (1) a determination whether an alternative basis existed for removal jurisdiction and (2) resolution of the

merits of those claims that were properly in federal court. *Stephenson* v. *Dow Chem. Co.*, 346 F.3d 19, 21 (2d Cir. 2003) (per curiam).

On remand, Judge Weinstein held that the cases were properly removed under Section 1442(a)(1), which in relevant part provides for the removal of a suit against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or any agency thereof, sued in an official or individual capacity for any act under color of such office." Pet. App. 23a-42a. Judge Weinstein opined that removal is permissible under that provision if three elements are satisfied. First, "a defendant must demonstrate that it is a 'person' within the meaning of the statute." *Id.* at 30a. Second, the suit must be for an "'act under color of federal office,'" which calls for "a causal nexus between the defendant's actions under federal office and the plaintiff's state court claims" and requires "[a] substantial degree of direct and detailed federal control over the defendant's work." *Id.* at 30a, 32a. Third, "defendants must raise a colorable claim to a federal law defense," which "may be predicated on the federal government contractor defense." *Id.* at 30a, 36a.

Noting that this Court has rejected "a 'narrow, grudging interpretation'" of Section 1442(a)(1) (Pet. App. 35a (quoting *Jefferson County* v. *Acker*, 527 U.S. 423, 431 (1999))), Judge Weinstein found these requirements satisfied here. He held that "corporations are persons under Section 1442(a)(1)." *Id.* at 36a. He also determined that respondents "act[ed] under" a federal officer because "the government ordered specifications that differed from defendants' commercial applications," and "[t]he government's

full knowledge of the dioxin 'problem' inherent in the production of Agent Orange is evidence that the federal officials maintained control over the acts on which the litigation is based." *Id.* at 39a-40a. And Judge Weinstein reasoned that "[t]he government contractor defense is a colorable federal law defense in much the same way that self-defense is a colorable state-law defense to civil assault charges. In an assault case, the defendant may claim: 'He made me do it;' here a defendant may properly assert, 'the Government made me do it.'" *Id.* at 40a. Judge Weinstein added that this conclusion is strongly supported by the policy underlying federal officer removal because the government contractor defense, "while laying down a substantive rule, may be readily circumvented by state courts unsympathetic to the defendants." *Id.* at 41a.

3. The Second Circuit affirmed, relying in substantial part on this Court's decision in *Watson*. Pet. App. 1a-22a. The court of appeals agreed with Judge Weinstein that "removal in these cases fulfills the federal officer removal statute's purpose of protecting persons who, through contractual relationships with the Government, perform jobs that the Government otherwise would have performed." *Id.* at 6a.

Like the district court, the court of appeals found that corporations are "persons" within the meaning of Section 1442(a)(1). Pet. App. 12a. It also concluded that respondents "acted under" federal officers, pointing out that "[t]he words 'acting under' are to be interpreted broadly, and the statute as a whole must be liberally construed." *Id.* at 14a (citing *Watson*, 127 S. Ct. at 2304-05, and *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969)). The Second Circuit noted that, in *Watson*, this Court cited with evident

approval the Fifth Circuit's holding in *Winters*, 149 F.3d 387, that manufacturers of Agent Orange satisfied the "acting under" requirement because they helped federal officers "'fulfill * * * basic governmental tasks.'" Pet. App. at 15a (quoting *Watson*, 127 S. Ct. at 2308). So too, the Second Circuit held that, in this case, "the chemical companies 'assist[ed]' and 'help[ed] carry out[] the duties or tasks of' officers of the department of defense. See [*Watson*, 127 S. Ct.] at 2307. Defendants thus had the 'special relationship' with the Government required by the 'acting under' prong." *Id.* at 16a.

Finally, the court of appeals held that respondents were being sued for an "act under color of [federal] office." The court explained that, to satisfy this requirement, nongovernmental defendants "must demonstrate that the acts for which they are being sued – here, the production of dioxin in Agent Orange – occurred *because of* what they were asked to do by the Government." Pet. App. 17a. "According to [respondents'] theory of the case," the court continued, "the Government knew that Agent Orange contained dioxin, and the Government controlled the method of formulation"; "whether the challenged act was outside the scope of [respondents'] official duties, or whether it was specifically directed by the federal Government, is one for the federal – not state – courts to answer." *Id.* at 17a-18a (citing *Willingham*, 395 U.S. at 409). Finding that respondents also raised "a colorable federal defense" because the government contractor defense "is a creature of federal common law and serves to protect the interests of the Government rather than the contractor defendant" (*id.* at 19a, 20a), the court of appeals accordingly held removal proper.

THE PETITION SHOULD BE DENIED

The general contours of Section 1442(a)(1) are settled. The statute has three elements: it permits removal of suits against "[1] any person [2] acting under [a federal] officer * * * [3] for any act under color of such office." Section 1442(a)(1) is phrased "in sweeping terms" (RICHARD H. FALLON, JR., ET AL., HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 908 (5th ed. 2003)), and this Court has repeatedly "rejected a 'narrow, grudging interpretation' of the statute" (*Jefferson County*, 527 U.S. at 431), instead "ma[king] clear that the statute must be 'liberally construed.'" *Watson*, 127 S. Ct. at 2305.

The Second Circuit's application of these standards does not warrant review. Its decision is wholly consistent with the rulings of other courts of appeals that – as this Court noted in *Watson* – have approved the removal to federal court of suits against manufacturers of Agent Orange. See 127 S. Ct. at 2308 (citing *Winters*, 149 F.2d at 387); *Miller* v. *Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001). Nor is there significant confusion in the district courts on removal standards under Section 1442(a)(1); no court has held removal by a government contractor improper when, as here, the contractor is able to allege that "[t]he government designed, controlled, and supervised the production" of the assertedly harmful product. Pet. App. 36a. And the decision below plainly was correct in holding that Section 1442(a)(1) authorizes removal of a case, like this one, where "the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision" and the suit centers on actions of the contractor in "help[ing]

[federal] officers fulfill * * * basic governmental tasks." *Watson*, 127 S. Ct. at 2308. The petition for certiorari accordingly should be denied.

A. The Decision Below Does Not Conflict With The Approach Taken By Other Courts To Removal By Government Contractors.

Petitioners assert that the Second Circuit held removal proper "based on the mere fact that [respondents are] government contractor[s]" (Pet. i), a characterization of the holding that is repeated throughout the petition. See Pet. 10, 12, 14, 16, 22, 28. This holding, petitioners continue, conflicts with the decisions of a handful of district courts, which are said to have rejected the proposition that "mere participation in the contract alone" justifies removal, instead looking to whether the "removing contractor was required or directed by federal authority to perform the *specific conduct challenged in the state-law claim*." *Id.* at 17, 18. But both prongs of this argument are wrong.[3]

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[3] Petitioners assert in a footnote to the petition that the Second Circuit's ruling that corporations are "persons" under Section 1442(a)(1) "conflicts with several district court opinions holding that the statute only applies to *natural* persons." Pet. 20 n.7. It is not entirely clear whether petitioners mean to challenge this aspect of the Second Circuit's decisions. Such a contention would, in any event, be insubstantial. The most recent of the two district court decisions relied upon by petitioners is more than 15 years old; for the reasons persuasively explained by the Second Circuit (at Pet. App. 12a-14a), the courts have more recently, and uniformly, held that corporations are "persons" within the meaning of the statute. See *id.* at 31a-32a (citing cases).

To begin with, petitioners mischaracterize the holding below. The Second Circuit expressly did *not* hold that any act by an entity that contracts with the United States supports removal, or that removal may be premised on the "mere fact" that the defendant entered into a contract with the government. To the contrary, it was central to the holdings of both courts below that Agent Orange was not an off-the-shelf product; it was designed by, and respondents produced it according to precise specifications provided by, the government. Pet. App. 18a, 38a. Nothing in the decisions of the court of appeals or district court supports removal of disputes arising out of the vast run of routine contracts performed by entities that provide light bulbs or chicken salad sandwiches to the government.

Moreover, both courts below also emphasized that removal by a private entity is proper only when the defendant advances a colorable federal contractor defense. Pet. App. 19a-22a, 35a. That requires a showing of substantial federal involvement in, and the exercise of government discretion regarding, the activities giving rise to the plaintiffs' suit. See *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 511-12 (1988). Here, the court of appeals found a "special relationship" between respondents and the government, pointing to "close supervision of the private entity by the Government" and noting that, in providing "a product that the Government was using during war – a product that, in the absence of Defendants, the Government would have had to produce itself" – "the chemical companies 'assist[ed]' and 'help[ed] carry out[] the duties or tasks of officers at the Department of Defense." Pet. App. 15a-16a (quoting *Watson*, 127 S. Ct. at 2307) (brackets added by the court). Petitioners therefore are simply wrong in

reading the Second Circuit's decision to hold that removal is proper "any time a defendant is sued for violations of state law that occurred while the defendant was performing under a contract with the federal government." Pet. 1.

It thus is not surprising that – wholly apart from the point that conflict with a district court decision ordinarily does not justify the grant of certiorari[4] – petitioners also are wrong in contending that the Second Circuit's decision is inconsistent with the district court decisions cited at Pet. 17-19. Although petitioners are correct in observing that courts have rejected the proposition that every suit involving a government contractor is removable, the Second Circuit, as noted, clearly did not endorse that proposition here. To be sure, some district courts have required a significant degree of government "regulation, monitoring, or supervision" of the contractor to justify removal. *Watson*, 127 S. Ct. at 2308. See *Green* v. *A.W. Chesterton Co.*, 366 F. Supp. 2d 149 (D. Me. 2005); *Arness* v. *Boeing N. Am., Inc.*, 997 F. Supp. 1268 (C.D. Cal. 1998) (cited at Pet. 18). But

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[4] See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 256 (9th ed. 2008) ("The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit."). While petitioners are correct in stating (Pet. 17) that decisions to remand are not appealable, the decision that removal is proper *may* be appealed – as was done in this case. Courts of appeals therefore address removal standards with some frequency. Indeed, this is the third decision of a court of appeals to address the specific question whether manufacturers of Agent Orange may remove under Section 1442(a)(1). As noted in text, each court to decide that question has held removal proper.

that is present in this case, where "[t]he government designed, controlled, and supervised the production of Agent Orange as a product vital to the prosecution of the war in Vietnam." Pet. App. 36a. See Pet. 15a, 17a.[5] Nothing in the district court decisions relied upon by petitioners suggests that removal is inappropriate in such circumstances.[6]

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[5] The record here shows extensive day-to-day direction of and control over Agent Orange production by Commerce and Defense Department officers. For example, the government assigned federal officers (including an Administrative Contracting Officer, an Industrial Specialist, a Quality Assurance Representative, a Preservation Packing Specialist, a Transportation Officer, and a Labor Relations Specialist) to oversee the execution and fulfillment of *each* Agent Orange contract (A1402); the Business and Defense Services Administration directed each manufacturer to provide monthly reports of production, total shipments, and end-of-month inventory of 2,4,5-T and 2,4-D (A2571); and it repeatedly ordered contractors to accelerate their herbicide production. A2571. Any factual quibbles petitioners may have with the lower courts' findings on these points are plainly inappropriate grounds for certiorari.

[6] In *Green*, for example, where the plaintiff claimed injury from exposure to asbestos used as insulation by a federal contractor, the district court held that "the removing defendant must demonstrate that the government specified the composition of the offending product at issue so that there is a 'causal nexus between the federal officer's directions and the plaintiff's claims.'" 366 F. Supp. 2d at 153 (quoting *Winters*, 149 F.3d at 398). Here, of course, the federal government *did* specify the composition of Agent Orange – and the court in *Green* relied for its standard on *Winters*, in which the Fifth Circuit *approved* removal by manufacturers of Agent Orange. Similarly, in *Good* v. *Armstrong World Industries, Inc.*, 914 F. Supp. 1125, 1129 (E.D. Pa. 1996), another asbestos case cited by petitioners (at Pet. 19), the defendant failed to show that "any * * * federal officer directly controlled and supervised [its] work." But respondents made such a showing here. Petitioners also are wrong in asserting that "[n]othing demonstrates the confusion among the

B. The Courts Below Correctly Held Removal Proper In The Circumstances Of This Case.

Petitioners also are incorrect in their challenge to the merits of the holding below. The Second Circuit's decision relied on standards articulated by this Court in *Watson*, *Jefferson County*, *Willingham*, and *Mesa* v. *California*, 489 U.S. 121 (1989). Its analysis – and its unexceptional holding that removal to federal court may be sought by private parties who assisted the United States in the conduct of a war by providing essential war materials, produced according to precise government specifications that were designed by the U.S. military and that differed materially from the formulation and use of commercial herbicides – is entirely consistent with this Court's doctrine.

1. Pointing to *Watson*, petitioners insist that respondents did not "act under" a federal officer because – on the assumption that the government did not specify the methods respondents were to use in manufacturing Agent Orange – respondents' relationship with the government did not involve "'subjection, guidance, or control.'" Pet. 23 (quoting *Watson*, 127 S. Ct. at 2307). But this contention assumes its conclusion. Nothing in the statutory mandate that the party seeking removal "act under" federal

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federal courts more" than Judge Weinstein's change of mind between *Ryan* v. *Dow Chem. Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992), in which he held that Section 1442(a)(1) removal was not available to producers of Agent Orange, and this litigation, in which he reached the opposite conclusion. Pet. 15. In fact, the holding below *eliminated* any disagreement in the lower courts, as Judge Weinstein declared himself persuaded by the Fifth Circuit's holding favoring removal in *Winters*. See Pet. App. 27a-28a.

supervision requires a showing that the government dictated every detail of the means used by that party to carry out the tasks assigned to it by the government, and nothing in any decision of this Court suggests that such a showing is necessary. There is no question that, in this case, respondents were "'[s]ubject to the instruction, direction, or guidance of'" the United States (*Watson*, 127 S. Ct. at 2307 (quoting 18 OXFORD ENGLISH DICTIONARY 949 (2d ed. 1989))) within the ordinary meaning of those terms: respondents produced Agent Orange according to the government's "detailed specifications" (Pep. App. 37a); "[t]he government was aware of the dioxin in Agent Orange" (*ibid.*); the government actually compelled respondents to produce Agent Orange under the DPA, on pain of criminal penalties; and, as we have noted, the government exercised substantial day-to-day direction and control over Agent Orange production. See note 5, *supra*; see also Pet. App. 16a ("Defendants received delegated authority; they were not simply regulated by federal law."), *id.* at 36a ("The government designed, controlled, and supervised the production of Agent Orange as a product vital to the prosecution of the war in Vietnam."), *id.* at 39a ("federal officials maintained control over the acts on which the litigation is based").[7]

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[7] For this reason, petitioners are wrong in their improbable assertion that the Second Circuit's removal holding is inconsistent with the same panel's simultaneous ruling on the merits regarding application of the government contractor defense. Petitioners point to the court of appeals' observation, in its merits ruling, that respondents "'were under no federal contractual duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the toxicity levels.'" Pet. 24 (quoting *Stephenson*, 517 F.3d at 93). But as we show in text, removal does not turn on a demonstration that

There should be no doubt that this relationship satisfies the "acting under" standard articulated in *Watson*. "[T]he relationship between [respondents] and the Government [was] an unusually close one involving detailed regulation, monitoring, or supervision." 127 S. Ct. at 2308. "The assistance that [respondents] provide[d] federal officers * * * help[ed] officers fulfill * * * basic governmental tasks" (*ibid.*) – that is, fighting a war. And respondents surely "'lawfully assist[ed]' the federal officer[s] 'in the performance of [their] official duty.'" *Id.* at 2307.[8] Respondents accordingly "acted under" a federal officer.

2. Petitioners get no further in contending that respondents did not act "under color" of federal authority. In making this argument, petitioners rely on *Mesa* for the proposition that "the fact that * * * fed-

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the government mandated every particular of the defendant's conduct; it is enough that, as here, respondents were "'[s]ubject to the instruction, direction, or guidance of'" the United States. *Watson*, 127 S. Ct. at 2307.

[8] Petitioners err in asserting that "the panel's review of the substantial record below revealed that the alleged 'regulation, monitoring or supervision' never existed." Pet. 22 n.8. See also *Id.* at 10 (contending that the court of appeals "expressly rejected the district court's conclusion that 'the government designed, controlled and supervised the production of Agent Orange'"). Neither the Second Circuit's holding on removal nor its companion ruling on the merits even remotely suggested the absence of significant government control over the design and production of Agent Orange. Petitioners' argument that the Second Circuit's ruling on the merits raised doubts about the state of the record on this point is wrong; the portion of the merits decision quoted by petitioner (*id.* at 22-23 n.8) addressed, not the degree of control exercised by the government, but the extent of the government's knowledge of the possible dangers of exposure to Agent Orange. See *Stephenson*, 517 F.3d at 98 n.19.

eral officer defendants were being prosecuted for acts committed while on duty was insufficient to show that they were acting under color of federal office," and maintain that "the Second Circuit clearly erred in holding below that *private* contractors can do just that." Pet. 25. But this contention rests on a plain misunderstanding both of *Mesa* and of the Second Circuit's holding.

In *Mesa*, the Court held removal improper because the defendants did not offer a federal defense *at all*. See 489 U.S. at 129, 133-34. Here, in contrast, respondents advance the government contractor defense, which "clearly 'ar[ose] out of [Defendants'] duty' pursuant to their contractual relationship with the Federal Government." Pet. App. 20a (quoting *Willingham*, 395 U.S. at 407; bracketed material added by the court). Petitioners do not deny that the government contractor defense satisfies the requirement of a "colorable federal defense" identified in *Mesa*. 489 U.S. at 129.[9] And for this purpose, it is enough that the federal defense is plausible; the Court does "not require the [defendant] virtually to 'win his case before he can have it removed.'" *Jefferson County*, 527 U.S. at 431 (quoting *Willingham*, 395 U.S. at 407).

Petitioners also are wrong on two counts when they maintain that the Second Circuit's analysis of

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[9] Petitioners do note that there is "federal court authority questioning this proposition," pointing to a single district court decision that, in dictum, expressed uncertainty on the point. Pet. 21 n.7. But as Judge Weinstein explained below, the many courts that have actually decided the question were unanimous in holding that the government contractor defense is a "colorable federal defense" for removal purposes. Pet. App. 36a; see also *id.* at 20a-21a.

the "under color" requirement is inconsistent with decisions of this Court interpreting "identical language in federal civil rights statutes." Pet. 26. For one thing, the language of Section 1442(a)(1) and that of 42 U.S.C. § 1983, which was at stake in the decisions cited by petitioners at Pet. 26, is *not* identical. Section 1983, which refers to actions taken "under color of state *law*," is directed at circumstances where a private actor essentially is acting *as* the State. See *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 52 (1999) (emphasis added). Section 1442(a)(1), which refers to actions taken "under color of [federal] *office*" and expressly contemplates removal by private persons who are *not* officers of the United States, does not require the same sort of exercise of governmental authority.

In any event, and even disregarding that distinction in the statutory text, the decisions cited by petitioners are in fact consistent with the approach taken by the Second Circuit here. In *American Manufacturers*, the Court held only that a private party does not act under color of state law within the meaning of Section 1983 when it "'is subject to state regulation'"; "subtle encouragement" by the State does not convert private activity into state action. 526 U.S. at 52-53. But here, of course, the federal government – by specifically requesting and then, by invoking the DPA, *compelling* production of Agent Orange – offered far more than "subtle encouragement" to respondents. Similarly, in *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982), the Court held that a private party does not become a state actor simply because it is a government contractor when the particular actions challenged "were not compelled or even influenced by any state regulation." *Id.* at 840-41. See *id.* at 844 (White, J., concurring in the

judgment) (action not "based upon some rule of conduct or policy put forth by the State"). That holding has no application to a situation like the one here, where a private party is compelled to produce materials designed by the United States for use in the prosecution of military action. These decisions offer no reason to question the correctness of the holding below.[10]

3. Finally, even if there were some doubt about the proper scope of Section 1442(a)(1), this case would not be an appropriate one in which to consider the question. *Watson*, the first modern decision in which the Court has discussed application of the statute to a government contractor, is little more than a year old. The lower courts have not yet had an opportunity to apply the Court's analysis to any significant degree, and it appears that the only decision of a court of appeals other than this one to apply *Watson* did so in a factual setting (tobacco regulation) identical to that considered in *Watson*. See *Kelly* v. *Martin & Bayley, Inc.*, 503 F.3d 584 (7th Cir. 2007) (per curiam). It therefore would be appropriate for this Court to await further consideration of the issue by the lower courts before weighing in itself.

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[10] Petitioners draw no more support from *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966), which they cite at Pet. 27. The Court there held that the civil rights removal statute, 28 U.S.C. § 1443(2), applies only to federal officers and those acting under them, and therefore could not be invoked by private parties who were not acting in concert with federal officers. See 384 U.S. at 810, 815, 821, 824. That holding has no bearing in this case, where there is no doubt that respondents were acting at the behest of the federal government.

Moreover, as we have noted, this case involves a unique consideration that plainly bears on application of the proper removal analysis: respondents were *compelled* to supply Agent Orange to the government by invocation of the DPA. Because that statute is no longer in effect, and there accordingly is no possibility that a case with this unusual feature will arise in the future, resolution of the dispute here would provide little useful guidance to the lower courts. If the Court is inclined to consider the scope of Section 1442(a)(1), it would be appropriate to do so in a vehicle that has more in common with the usual run of government contractor cases.

Petitioners' policy arguments in favor of immediate review are insupportable. Their contention that the Second Circuit's decision "has the potential to overwhelm already over-burdened federal courts" (Pet. 27-28) rests on a misstatement of the holding below, which does *not* permit removal of "virtually all" suits brought against government contractors. *Id.* at 28. And petitioners' assertion regarding the purported inconvenience of litigating in federal court (*id.* at 28-29), as well as their suggestion that an expansive removal rule is inconsistent with principles of federalism (*id.* at 30-32), simply disregards the particular goals that Congress sought to advance in Section 1442(a)(1). The courts below did not, as petitioners would have it, depart from controlling law by improperly "voic[ing] their concerns about the capacity of state courts to handle litigation." Pet. 31-32. Instead, this Court, in decisions dating back more than a century, consistently has identified the congressional purpose behind Section 1442(a)(1) and its many statutory predecessors: "Congress has decided that federal officers, and indeed the federal Govern-

ment itself, require the protection of a federal forum." *Willingham*, 395 U.S. at 407.

As the Court put it most recently in *Watson*, "the removal statute's 'basic' purpose is to protect the Federal Government from * * * interference with its 'operations'" at the hands of hostile state courts. 127 S. Ct. at 2306. "State court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials," "States hostile to the Federal Government may impede * * * the enforcement of * * * federal law," "[a]nd States may deprive federal officials of a federal forum in which to assert federal immunity defenses." *Ibid.* And, as the plain terms of Section 1442(a)(1) indicate, "some of these same considerations may apply" when "a private person acts as an assistant to a federal official." *Id.* at 2307. For this reason, "[t]he federal officer removal statute is not 'narrow' or 'limited,'" and its important policy "should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)." *Willingham*, 395 U.S. at 406-07.

These considerations apply with full force to this litigation. The Vietnam War, like the other great national controversies that prompted enactment of Section 1442(a)(1)'s predecessor statutes (see *Watson*, 127 S. Ct. at 2305), was the source of heated debate and, in some quarters, considerable hostility to the policies of the national government. The Agent Orange defoliation program, which had a central role in that debate, has not become less controversial over time. The court of appeals therefore was quite correct in observing that "removal in these cases fulfills the federal officer removal statute's purpose of protecting persons who, through contractual relationships with the Government, perform jobs that the

Government otherwise would have performed." Pet. App. 6a. Indeed, as Judge Weinstein noted below, "[b]ecause government contractor cases are freighted with factual findings, [the government contractor defense], while laying down a substantive rule, may be readily circumvented by state courts unsympathetic to the defendants." *Id.* at 41a. And "[i]f cases such as those in the present wave of Agent Orange claims were scattered throughout state courts[,] manufacturers would have to seriously consider whether they would serve as procurement agents to the federal government," an outcome that would "provide a significant deterrent to necessary military procurement." *Ibid.* Because the decision below accordingly is faithful to the language and purpose of Section 1442(a)(1), and because there is no confusion in the lower courts that requires this Court's attention, this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JOE ISAACSON,
PHYLLIS LISA ISAACSON, ET AL.,

Petitioners,

v.

DOW CHEMICAL COMPANY,
MONSANTO COMPANY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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ARGUMENT

As argued in the Petition for a Writ of Certiorari, the Second Circuit's decision below conflicts with decisions of numerous lower federal courts and of this Court by holding that the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1), permits removal by a private government contractor being sued for actions that the government neither addressed in its contract nor directed thereafter. Respondents try to obscure this split of authority by making erroneous assertions about the decision below, including that it held that the federal government directed, controlled and supervised the manufacture of Agent Orange or, more specifically, the 2,4,5-T in which the dioxin contaminant was produced. However, one is hard-pressed to find the facts Respondents allege even mentioned by the Second Circuit, save where the court squarely *rejected* their allegations. As a result, Respondents rarely cite to the Second Circuit's opinion itself, which significantly broadens the scope of § 1442(a)(1) by holding that the statute permits removal whenever a private defendant merely *alleges* that the act forming the basis of suit (here, production of dioxin in Agent Orange) occurred *while* the defendant was performing under a federal government contract. *See* Pet. 17a.

This expansive ruling cannot be reconciled either with other lower court decisions requiring government direction of the specific conduct forming the basis of suit for a private contractor to obtain federal officer removal, or with this Court's decisions applying § 1442(a)(1) or other statutes covering acts done

"under color" of government authority. In light of this significant split of authority over the jurisdictional question presented, the Petition for a Writ of Certiorari should be granted.

I. Respondents Try to Recast the Supporting Facts and Substance of the Second Circuit's Opinion to Obscure the Split of Authority Implicated by This Decision.

Federal courts in other Circuits have consistently held that § 1442(a)(1)'s "act under color" or causation prong, *see Willingham v. Morgan*, 395 U.S. 402, 409 (1969), requires defendants to show that the government directed the specific conduct that is the basis of suit. *See, e.g., Green v. A.W. Chesterton Co.*, 366 F. Supp. 2d 149, 155 (D. Me. 2005); *Freiberg v. Swinerton & Walberg Prop. Serv's, Inc.*, 245 F. Supp. 2d 1144, 1155 (D. Colo. 2002); *Arness v. Boeing North Am., Inc.*, 997 F. Supp. 1268, 1275-76 (C.D. Cal. 1998); *Good v. Armstrong World Ind's, Inc.*, 914 F. Supp. 1125, 1130 (E.D. Pa. 1996).

Recognizing this, Respondents try to reframe the decision below as one involving "compelled" production of a product by repeatedly citing to the "rated" order system that had long been in place for most military contracts under the Defense Production Act of 1950 ("DPA"), 64 Stat. 798 (codified at 50 U.S.C. App. §§ 2061 *et seq.*). *See* Opp. 2, 3-4, 18, 20. However, the Second Circuit never even mentioned, let alone

relied upon, the DPA in upholding removal. This is most likely because Petitioners presented two extensive affidavits from Professor Ralph Nash, one of the country's foremost experts on government contract law, demonstrating both that there was nothing unique about the contracts Respondents voluntarily bid for and that Respondents were never "compelled" to do anything. *See* AA6991-94, 10348-52.[1] Thus, rather than finding that Respondents' production of Agent Orange was compelled, the Second Circuit expressly held as a matter of law that § 1442(a)(1) does not require a private contractor to show such compulsion. *See* Pet. 18a ("To require the relationship to have been . . . coerced makes little sense.").[2]

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[1] "AA" refers to Plaintiffs-Appellants' appendix in the Second Circuit.

[2] Respondents erroneously maintain that 2,4,5-T was not a commercial product. Opp. 11. But at the time of its use in Vietnam, every year 50 million tons of 2,4,5-T were being sprayed commercially in the United States. AA4248, 4276, 4774. As the official Air Force History of Operation Ranch Hand stated: "None of the herbicides . . . were of a new or experimental nature. AA7986; *see also* AA4476, 4493, 5804-46, 5958, 6340-51, 6817. 2,4,5-T and 2,4-D had been sold separately or together for almost two decades. AA5507-17, 5521-42, 5693, 5801, 5846, 6817. They killed different plants, so they were frequently used in combination to defoliate places such as railroad right-of-ways. Respondents' employees testified that the specifications for 2,4,5-T were the same whether the use was commercial or military. AA6198, 6280-84, 8145. Dow even held a patent on Agent Purple. AA3850-55, 5908-09. Although Respondents contend that Agent Purple/Orange was 100% herbicide, the chemical at issue, 2,4,5-T, constitutes only 50% of these "Agents." Since 2,4,5-T was invariably sold commercially in stand-alone concentrations of 55% or

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Alternatively, Respondents by sleight of hand try to insert the heretofore necessary "control" element into the Second Circuit's decision by substituting in the *district court's* finding that "'the government designed, controlled, and supervised the production'" of Agent Orange. *See, e.g.*, Opp. 3, 9, 13 (citing Pet. 36a); Opp. 15 (citing Pet. 37a, 39a). But the Second Circuit, in its companion opinion on summary judgment, squarely *rejected* this very finding:

> The defendants do not contest that the government's contractual specifications for Agent Orange were **silent regarding the method of manufacture** or that the government harbored **no preference**, expressed or otherwise, regarding **how the herbicides were to be produced**. *See, e.g.*, Appellees' Br. at 36-37. Indeed, they admit that they were under **no federal contractual duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the resulting toxicity levels**.

In re "Agent Orange" Prod. Liability Litig., 517 F.3d 76, 93 (2d Cir. 2008) (copied in Pet. No. 08-461 at 31a) (emphasis added).

Having thus squarely rejected Respondents' contention that the government designed, controlled,

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more, commercial 2,4,5-T had a greater concentration of 2,4,5-T, and hence dioxin, than the 50% in the Agent Purple/Orange mixture. *See* Final Reply Brief of Plaintiffs-Appellants Daniel Raymond Stephenson, *et al.*, in No. 05-cv-1760 (2d Cir., filed June 23, 2006)).

and supervised the production of Agent Orange, the Second Circuit instead held that Respondents satisfied § 1442(a)(1)'s "act under color" or causation prong **merely by alleging** that the conduct at issue (i.e., the production of dioxin in the 2,4,5-T half of Agent Orange) occurred **during** performance of a federal government contract:

> Translated to non-governmental corporate defendants, such entities must demonstrate that the acts for which they are being sued – here, the production of dioxin in Agent Orange – occurred *because of* what they were asked to do by the Government. **We credit Defendants' theory** of the case when determining **whether a causal connection exists**. . . .
>
> . . . To show causation, **Defendants must only establish that the act** that is the subject of Plaintiffs' attack (here, the production of the byproduct dioxin) **occurred *while* Defendants were performing their official duties**.

Pet. 17a (emphasis added). Thus, Respondents' protestations notwithstanding, the Second Circuit's removal decision was not based on any finding that the government either controlled or specifically directed Agent Orange production, much less that it participated in any way in producing the high levels of dioxin contamination that resulted from Respondents' selected proprietary production processes. Instead, the court broadly held that private contractors may remove cases to federal court simply by alleging that the conduct at issue occurred during

performance of a federal government contract. This conclusion conflicts with significant authority requiring government direction of the precise conduct that is the basis of suit.

II. The Decision Below Cannot Be Reconciled With This Court's Decisions Applying the Federal Officer Removal Statute and Other Similarly Worded Statutes.

Respondents also fail in trying to harmonize the Second Circuit's removal opinion with this Court's decisions applying § 1442(a)(1) and 42 U.S.C. § 1983's similarly worded coverage of persons acting "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory . . . " These decisions have consistently required parties invoking these statutes to show not simply that they were performing under government direction at the time of the acts at issue, **but that the government directed the specific acts** that form the basis of suit.

This Court has long recognized that § 1442(a)(1)'s requirements that a party be "acting under" a federal officer *and* that the suit be based on an "act under color of such office" are separate and distinct. In *Mesa v. California*, 489 U.S. 121 (1989), the Court held that U.S. Postal Service employees could not remove state criminal prosecutions for traffic offenses committed while on duty to federal court under § 1442(a)(1). In so holding, the Court recognized the parties' agreement that the postal workers were "'persons acting under' an 'officer of the United States or any agency

thereof' within the meaning of § 1442(a)(1)." *Id.* at 125. However, notwithstanding the state's concession that the defendants were acting under a federal officer, the Court proceeded to decide the separate question under § 1442(a)(1) of whether the state prosecutions were "'for act[s] under color of such office' within the meaning of that subsection," *id.*, *and held that they were not*. In light of the requisite separate treatment of the statute's "acting under" and "under color of office" prongs, the Second Circuit's decision below conflating them (*see* Pet. 15a-16a, 17a) and abdicating any analysis of whether **the specific conduct in question** was performed "under color of office," i.e., under the government's direction, supervision or control, is directly contrary to *Mesa*.

Respondents' attempts to harmonize *Mesa* with the decision below fail. Respondents correctly note (Opp. 16-17) *Mesa*'s holding that federal officer removal under § 1442(a)(1) must be predicated upon a federal law defense. 489 U.S. at 139. In so holding, however, the Court squarely rejected the U.S. government's argument that the statute's "under color of office" provision "must be construed broadly to permit removal of any civil actions or criminal prosecutions brought against a federal officer for acts done during the performance of his duties . . . " *Id.* at 135. Yet, despite *Mesa*'s rejection of this sweeping argument for removal by federal *employees*, the Second Circuit below embraced this very same argument as the basis for removal by *private contractor defendants*. *See* Pet. 17a.

Moreover, *Mesa* did not reject removal simply because of a pleading error by the defendants in

failing to assert a federal defense. Instead, the Court squarely found that "Mesa and Ebrahim have not *and could not* present an official immunity defense to the state criminal prosecutions brought against them." 489 U.S. at 133 (emphasis added). The reason these on-duty Postal worker defendants *could not* assert a federal law defense was that their specific conduct at issue, i.e., their commission of traffic offenses, was not itself directed by a federal officer, and thus could not be deemed an "act under color of such office." The decision below, by contrast, effectively jettisons this requirement by embracing the argument *Mesa* rejected and allowing private government contractors to obtain removal based on the mere fact that they contracted to produce a product for a federal officer – here, 2,4,5-T – regardless of the fact that the dioxin contamination was produced as a result of Respondents' proprietary, sub-standard production methods as to which the government never had any knowledge or input.

Respondents also fail to distinguish this Court's decisions repeatedly holding that 42 U.S.C. § 1983's substantively identical coverage of persons acting "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory" likewise requires government direction of the specific conduct that is the basis of suit. *See, e.g., American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) ("Thus, the private insurers in this case will not be held to constitutional standards unless there is a sufficiently close nexus between the State **and the challenged action** of the regulated entity so that the latter may be fairly treated as that of the State itself." (citation

omitted) (emphasis added); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) ("Acts of private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.").

Respondents contend, for example, that § 1983's coverage of acts under color of state *law* is far narrower than § 1442(a)(1)'s coverage of acts under color of federal *office*. *See* Opp. 18. But they cite no authority for attaching any significance whatsoever to this distinction between two statutes both aimed at conduct directed by government authority.

Nor do Respondents succeed in their attempt to harmonize these decisions on their facts. For example, Respondents try to distinguish this case from *American Manufacturers* on the grounds that here the government allegedly compelled production of Agent Orange under the DPA. Opp. 18. But, as discussed, the Second Circuit expressly eschewed any reliance on compulsion or control in reaching its holding. Pet. 18a. In doing so, the Second Circuit not only disregarded the § 1442(a)(1) and § 1983 cases discussed herein, but also directly contravened authority of this Court that turns on this precise distinction between general government oversight and specific government direction of the conduct that forms the basis of suit.[3]

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[3] In *Blum v. Yaretsky*, 457 U.S. 991 (1982), for example, the Court held that the Fourteenth Amendment's "state action" requirement, which is treated as co-extensive with § 1983's

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III. The Conflict Between the Decision Below and Those of Other Circuits Over Statutes Covering Acts "Under Color" of Government Authority is Marked and Apparent.

Significant circuit court case law addressing statutory requirements of acts "under color" of government authority relies on the difference between general government oversight and a lack of government command of the precise acts at issue. *See, e.g., Single Moms, Inc. v. Montana Power & Light*, 331 F.3d 743, 747 (9th Cir. 2003) ("The Supreme Court has held that an ostensibly private organization or individual's action may be treated as the government's action 'if, **though only if**, there is such a close nexus between the State **and the challenged action** that seemingly private behavior may be fairly treated as that of the State itself.'") (quoting *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2000)) (emphasis added); *Gallagher v. "Neil Young Freedom Concert,"* 49 F.3d 1442, 1452 (10th Cir. 1995) ("'Contemporary decisions stress the necessity of a close nexus between the state and the challenged conduct . . . '") (quoting *Wagner v. Metro. Nashville Airport Auth.*, 772 F.2d 227, 229 (6th Cir. 1985)).

"under color" provision (*see, e.g., Rendell-Baker, supra*, 457 U.S. at 838), did not cover a nursing home's discharge of Medicaid patients where the nursing home was required to complete patient assessment forms designed by the State, 457 U.S. at 1008, but was not required to use these forms in making discharge determinations. *Id.*

The decision below thus deepens a significant split of authority among circuit courts over the proper scope of federal statutes covering acts "under color" of government authority, as well as a significant lower court split over the scope of federal officer removal by private contractors under § 1442(a)(1) itself.

IV. This Court's Decision in *Watson* Militates in Favor of Rather Than Against Review.

Respondents' remaining major argument is that the Court should deny the Petition in order to allow lower courts to consider the effect of its decision addressing § 1442(a)(1) in *Watson v. Philip Morris Co's*, 551 U.S. 142, 127 S. Ct. 2301 (2007). *See* Opp. 1-2, 14-16, 19. This argument ignores the fact that *Watson* expressly declined to decide whether or how § 1442(a)(1) applies to government contractors. *See id.* at 2308 ("[W]e need not further examine here (*a case where private contracting is not at issue*) whether and when particular circumstances may enable private contractors to invoke the statute.") (emphasis added). Nor did *Watson* address the question raised here as to the removal statute's "act under color of [federal] office" requirement. *Watson* merely held that a private defendant's alleged compliance with federal regulation does not satisfy § 1442(a)(1)'s separate

and antecedent requirement that parties have been "acting under" a federal officer. 127 S. Ct. at 2307-08.[4]

Watson thus did not even purport to decide whether or when a private contractor is deemed "acting under" a federal officer, let alone to resolve the split of federal court authority over how § 1442(a)(1)'s additional requirement that suit be based on an "act under color of such office" may apply to any private party. For the reasons set forth herein and in the Petition, certiorari should be granted to bring consistency and clarity to this important area of jurisdictional law.

---

[4] In so holding, the Court rejected Philip Morris's analogy of itself to government contractors, such as Agent Orange manufacturers, based upon the Fifth Circuit's holding (*albeit without any evidentiary record being submitted by the plaintiffs*) that these manufacturers were "acting under" a federal officer. *Id.* at 2308 (citing *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998)). In rejecting this analogy, *Watson* described factors that *might* distinguish government contractors, but then, as stated, expressly excepted these issues from its consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

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